# U. S. Circuit Court

## FOR THE EASTERN DISTRICT OF TEXAS.

MAY TERM, 1870.

N. A. COWDREY et al.,

THE GALVESTON, HOUSTON & HENDERSON RAILROAD CO. et al.

In Equity.

Before Hon. Jos. P. BRADLEY,
Associate Justice Supreme Court.

On Bill of Foreclosure of Mortgage. Answers and various motions.

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Messrs. Wm. P. BALLINGER & J. S. BLACK,
For Defendants.

Mr. W. G. HALE,
For Receiver.

## I.

The first exceptions presented, are to the Report of Master Hughes, made upon the accounts of Tipton Walker, Receiver, for the months of February, March and April, 1867.

The first exception is, that the defendants had no notice of the time and place of proceeding before the Master in respect to said accounts. This appears not to be founded in fact. Due notice is shown to have been given to the solicitors of the defendants

None of the exceptions were made or taken before the Master. No objection to these accounts appears to have been made before him.

It is well settled that unless exceptions are taken before the Master, they cannot afterwards be taken before the Court. This is required, in justice both to the Master and to the Receiver. To the Master, that he may have an opportunity to reconsider his decision ; to the Receiver, that he may sustain his account (if he can,) by additional evidence, or make such explanation as the case may require. This rule, it is true, would not deter the Court from directing an account to be reformed which contained manifest errors or plainly improper charges ; but such errors or improper charges ought to be clearly shown to exist, and their character as such ought to be evinced by the proofs in the case or by their intrinsic nature.

I am not satisfied that any of these exceptions are thus sustained ; and therefore feel bound to overrule them.

## II.

The next exceptions presented are to the Report of Master Waul, made upon the accounts of Tipton Walker, Receiver, for the consecutive months commencing with May, 1867, and ending with November, 1868.

These exceptions are founded upon objections made before the Master, and are, therefore, properly taken here,—so far as exceptions (properly so called,) can be taken to the report of a Master on a Receiver's accounts. For the books make a dis-

tinction between a Master's report on a Receiver's account and a Master's report containing an account taken and stated by himself, or a report upon a matter referred to him for his own investigation and ascertainment.

A Receiver is an officer of the Court as well as a Master, and states his own accounts and submits them to a Master for inspection under the order of the Court: the Master acting in place of the Court, in a judicial, rather than a ministerial capacity.

Strictly speaking, exceptions to his report in such cases do not properly lie, as they do to an account stated by himself, as in the case of executors, administrators, trustees, or partners, who are ordered to account before him. Nevertheless, if the Master adopt any erroneous principle in allowing a Receiver's account, the Court, on petition of the proper parties, will refer the matter back to him for correction.

The exceptions now presented, if we disregard the form, may be viewed substantially in the light of such a petition. But the distinction should be kept in view. For upon this distinction depends, in considerable degree, the nature of the duty now devolved upon the Court. That duty consists in reviewing the principles and rules adopted and followed by the Master in allowing the Receiver's accounts, rather than in examining the items of the account in detail, or the evidence on which those items are severally founded; the latter duty belonging, more especially, to the province of the Master acting in his judicial capacity; analogous to the province and duty of a jury on questions of fact. In this case there are several classes of charges for disbursements made by the Receiver, which can be considered in groups, and with reference to which the principles by which the Master was guided in allowing the account, can be reviewed. The first class which I shall consider embraces the charges for rebatement of freight, being an allowance returned to shippers of cotton, in consideration of securing their business and good will on the road. It is in proof, that this is equivalent to the allowance of drawbacks made by many transportation lines in the country; that it is a customary, or at least quite a usual thing; that it was necessary in this case in order to secure business on the railroad, as it had been previously adopted by a

and the Receiver himself, that the latter was justified, under the circumstances, in the expenditure made by him on this account. This exception is therefore sustained.

The next exception of the Receiver relates to the items of $260.65, and $260, for advertising the accommodations of the road in New Orleans. The advertisement contains a favorable reference to Walker, Kent & Co. as proper persons to facilitate the forwarding of freight. For the reasons stated by the Master I am satisfied with his decision on these items, and disallow the exception. It is true that the Receiver has shown that he was not interested in the firm of Walker, Kent & Co., but the use of his name in the firm, with his consent, made him liable for its obligations, and to that extent he was interested in its success; an advertisement therefore which had for its object, in whole or in part, the promotion of the interests of that firm should not be charged to the fund of which the Receiver was a trustee.

The next exception of the Receiver relates to the Master's disallowance of interest paid by him for money borrowed of the bank. The Master disallowed this interest because, as the accounts appeared before him, the Receiver had large balances of money on hand at the time when he made the loans on which the interest in question accrued. But it has since been shown, (and I think satisfactorily,) in corroboration of what the Receiver himself alleged under oath, that these balances were fictitious; that large amounts had been paid out by the Receiver for which he had not obtained the proper vouchers when the balances were made up; and that he was obliged to make the loans in question in order to carry on the operations of the road. I am, therefore, satisfied that the disbursements for interest were proper, and that the Receiver's exception to the Report in reference thereto should be allowed.

The final exception of the Receiver relates to the disallowance of his salary. As this subject will be separately discussed I pass it for the present.

The next exceptions are to the Report of Edward T. Austin, Master, made upon the accounts of said Receiver from December, 1868, to September, 1869, inclusive. These exceptions principally relate to charges for rebatement, wharfage and dray-

age, interest paid for money loaned, certain payments to Mr. Andrews for services rendered, certain incidental expenses relating to the Receiver's accounts, and the allowance to be made to him for his services as Receiver.

I have carefully examined these exceptions with the Master's Report and the evidence taken by him, and I concur generally in the results to which he has arrived. Upon the additional evidence taken before him he disallows the exceptions to the payment of interest for money loaned, and I concur in this result. Several accounts have been suspended by him for further direction from the Court. These are:

*First.*—The charges for moneys paid by way of rebatement on freight. These charges will be allowed, for the reasons before stated.

*Second.*—The Receiver's expenses, and counsel and witness fees for defending himself against the motion for his removal. These charges amount, in the aggregate, to $2,902.85. If the Receiver gave no occasion for that motion, he was put to unnecessary expense, and ought to be reimbursed either out of the fund in his hands, or by the defendants who made the motion. The trust fund, as well as the Receiver, ought not to suffer for an unreasonable and causeless application on the part of the defendants. But was the application of that character? Had the defendants no ground whatever for making the motion they did?

Without at this point deciding upon the Receiver's faithfulness or unfaithfulness to his trust, it is evident from an inspection of the reports, both of Master Waul and Master Austin, that the accounts of the Receiver were all along so complicated and unintelligible, that no satisfactory conclusion could be formed therefrom as to the condition of the trust, or the relative state of the accounts as between the Galveston, Houston & Henderson Railroad Company, and the other parties in interest; of this want of certainty, this confusion of the various accounts, this vagueness as to the condition of the trust, the defendants constantly and repeatedly complained before the Masters, until at last master Austin refused to pass the Receiver's

accounts, nntil they were rendered in a form calculated to give the information desired as required by the original order. After this was done a much more satisfactory exhibit was presented. But this was after the application for removal had been made.

I cannot say that the demands of the defendants for a more specific statement of the accounts were unreasonable ; nor that the difficulties which they experienced in getting at an explanation of the various items were not calculated in connection with other things, to raise suspicions as to the faithful management of the Receivership. I think that these circumstances are sufficient to exonerate the defendants from the burden of paying the costs and expenses incurred by the Receiver. Are they sufficient to cast the burden on the Receiver himself? If the Receiver acted in good faith, and was ever ready as far as he was able, to make any explanations that were personally required, but was unskillful in the manner of keeping his accounts, he ought not for that cause to be visited with a penalty. It is not every good business man, or engineer, or superintendent, that understands bookkeeping. It requires a peculiar aptitude to state and keep accounts with clearness and accuracy, especially where the transactions are varied, extensive and complicated. I should not feel disposed, therefore, to cast the burden of the expenses referred to on the Receiver, personally, unless satisfied that his method of keeping his accounts was adopted for the purpose of producing confusion and covering up the nature of his transactions I do not see any sufficient evidence that this was the case. On the contrary it seems to have been the endeavor of the Receiver to keep regular books and a constant record of his transactions ; and for this purpose he has employed competent clerical assistance. But the intrinsic difficulties of the case may well afford some excuse for a defective exhibition of all the aspects of the various receipts and expenditures. If I were satisfied that the Receiver was unfaithful to his trust, and did not, according to the best of his ability and understanding, perform the duties thereof, I should feel that I ought to cast the burden of these expenses on him. For that would have furnished good ground for his removal. But I cannot say, from anything which has been developed in the case that

he has not acted with entire integrity of purpose. Some things are undoubtedly susceptible of just criticism. I refer particularly to his acquiescence in paying out of his own anticipated allowance a stipulated sum to the counsel of the complainants. But it must be remembered that he was in the habit of frequently consulting that counsel and taking his advice and direction. He had a perfect right to do this, although it would have given less cause of dissatisfaction to the defendants had he invariably sought the advice of some attorney entirely disconnected with any of the parties to the suit. On the whole I do not consider the circumstance of these payments to counsel, injudicious, as it may have been for the Receiver to have thus exposed himself to unfavorable criticism, as indicative in him of any want of fidelity to his trust, or of integrity of purpose. It was undoubtedly a mistake so far as it regarded his relative position towards the different parties in the cause; and was calculated to awaken suspicions, and to destroy confidence in his administration. But being done on his own responsibility, and not charged to the trust, it was not necessarily inconsistent with entire rectitude of intention, as it regards the administration of the trust fund. Besides this was not one of the grounds on which it was sought to remove the Receiver, not having been known to the defendants at the time, and did not therefore enter into the considerations upon which any of the parties were then governed, and the Receiver had certainly acted on the supposition that his allowance for services would be more than sufficient to cover any advances thus made by him.

I am disposed, therefore, on the whole, to allow the Receiver's expenses in this behalf; and more especially in view of the fact that the charges against him were, by an amicable arrangement, withdrawn, and he thereupon voluntarily surrendered his charge to the Court, rather than continue therein to the evident dissatisfaction of one class of the parties interested.

This claim will, therefore, be allowed.

The only other matter suspended by the Master was the question of compensation for the Receiver's services.

This will be the next in order for consideration.

## In the Matter of Compensation to be Allowed to the Receiver.

The question of allowance to the Receiver for his services is one that properly belongs to the Master's office, and not to the Court.

In this case, especially, the local knowledge possessed by the Master with regard to the business habits and compensation for business and professional services in this community would have rendered a decision by him peculiarly valuable. But as it seems to be the desire of the parties that this matter should be decided by the Court, and as the order made by Justice Swayne seems to contemplate such a course, the Court will endeavor to discharge the duty as well as the means it has before it for arriving at a proper conclusion will admit.

In the first place it is claimed on the part of the Receiver that this question is concluded by the Report of the first Master, Judge Hughes, and the acquiescence of the defendants. I do not so regard it. It is sufficient to say that, by the subsequent decision of the Court, reserving the further consideration of the subject, and requiring evidence to be taken upon it, the question is *now* open, if it was ever regarded as settled. But the evidence does not satisfy me that the defendants did ever acquiesce in the allowance of $15,000 a year. The Receiver probably supposed they did, or at least supposed that the decision of master Hughes was definitive, not being objected to by the defendants until so late as the 24th of March, 1868. He undoubtedly for a long time acted under that impression, and this is one reason why his payments to Mr. Hale are to be regarded as a personal matter of his own, not intended to affect the trust fund for which he was accountable. But whatever his impression may have been, neither the parties nor the Court were committed to any specific allowance. For the Receiver, it is insisted that the Court confirmed Master Hughes' Report, and that this confirmation was for a long period undisturbed, so that the Receiver was misled-

Besides, the fact that the confirmation of a Master's Report on Receiver's accounts is not required, and, therefore, has no judicial effect, it is obvious to remark that all this was for the consideration of the Court upon the hearing of the exceptions to Master Hughes supplemental Report relating to the Receiver's compensation, and cannot have any influence upon the question as it now stands.

By the order of Justice Swayne, it is made an open question, and must be decided on its merits alone.

The defendants, on their part, contend that the Receiver has forfeited his title to all compensation, or, at least, to full compensation, in consequence of unfaithfulness to his trust, and complicity in alleged dishonest schemes entertained and attempted by the complainants.

Two matters have been specially referred to in support of this position. The first is, the before mentioned agreement to pay to the counsel of the complainant $5,000 a year out of the Receiver's allowance, provided the latter should not be less than $15,000 a year. This point has already been considered, and my views upon it fully expressed. I do not regard it as furnishing cause for refusing to the Receiver the proper compensation for his services. The other matter is, the agreement entered into by the Receiver with N. A. Cowdrey and others to give them twenty-five per cent. of the gross earnings of the Railroad, for the use of the Galveston bridge proposed to be built by them after the destruction of the former bridge. It is unnecessary to go into detail for the purpose of reviewing the history of that transaction. Suffice it to say, that I have failed to discover, in the proofs, evidence to convince me, that the Receiver acted corruptly, or in bad faith. The proposition was properly referred to the Court, and notice thereof given to the parties interested. A better bargain for the Railroad Company was effected, viz., a rent of ten per cent. of the gross earnings of the road, for the use of the bridge; and there is no evidence to show that the Receiver was not entirely satisfied and pleased with the result. The problem is one that might easily have led the fairest minds to quite different results. With our present knowledge of the cost of the bridge, and the amount of business commanded by the road, it is plain to see that even ten per

cent. is ample compensation; but at that time matters wore a different aspect. The Receiver was paying 33⅓ per cent. of the gross earnings of the railroad, for transportation across the bay. The perils to which a bridge would be exposed had recently forced themselves strongly upon the public attention, and the earnings of the road at this time were averaging only about $160,000 a year. Supposing the Receiver to have been anxious for its prosperity, it would be very natural for him to seize with avidity a proposition which would result in less expense than that involved in the arrangement then existing, and would relieve the freight of the road from the delay of a troublesome transhipment, and perhaps from other embarrassments arising from the conflict of adverse interests, which are indicated in the evidence.

Regarding the Receiver's conduct, therefore, in a spirit of fairness and common charity, I cannot see anything in this transaction which convicts him of want of integrity, or good faith. It is so easy and so natural for us all, after an event has happened, to be over-wise, and to be hypercritical upon the conduct of those who were actors in the antecedent chain of transactions which led to it, that we ought to be on our guard against imputing the worst motive of which an action is susceptible. We all know how fortunes have been within our reach in the past, had we but purchased property in or near growing cities, at a time when the prices were depressed, and land could have been bought for a trifle. After the local improvements have been made; after the City has sprung up around us; after prices have risen; standing on the vantage ground of developed events, and looking backward at the past, we wonder at our own stupidity in not having seen the chances that lay within reach, forgetting that the light of present circumstances did not shine upon us then as it does now; that the future is ever hid from our view. This after-wisdom—this hind-sight, as it has been aptly called—leads us unjustly to condemn ourselves and unjustly to condemn others, for not foreseeing events which could not be foreseen. A fair calculation of the chances may be excited into activity by keen self-interest, or keener antagonisms and competitions, which by good fortune may result in fortunate speculations.

But when the question before us is one of honesty, and fairness of intention; and the acts adduced as evidence to prove the opposite, consist merely of estimates and conclusions with regard to the future developments of business, we ought to hesitate a long time before we adopt a harsh conclusion.

Mr. Walker is dead. His attainments as a man of science and an engineer were of no ordinary kind. Unless compelled by the interests of justice, we ought not to lend too willing an ear to suggestions affecting his character for integrity and honesty. The proof of his deficiency in these respects ought to be clear and unmistakeable. His devotion to the interests of this road, after his appointment as Receiver, was, I think, undoubted. He may have occasionally erred in judgment. He may have had too great deference for the views of the complainants, who represented the interests of the bondholders, probably under the not unnatural impression that, so far as the main line was concerned, theirs was the only substantial interest at stake, as the bonds, if valid, would be likely to absorb the entire property.

But it must be acknowledged that under his administration the road was brought up from an almost hopeless condition, after the epidemic and the destruction of the bridge, in 1867, to one in which the receipts considerably exceeded the ordinary expenses; and that a large amount of earnings, in addition to the moneys borrowed by him as Receiver, were expended in the preservation and improvement of the property.

From the accounts presented to Master Austin, and from other evidences in the case, it appears that $30,310 in specie, and $91,655 in currency, were expended by him in permanent improvements and additions to the road and its equipment, besides what was disbursed for necessary expenses and repairs This would be equivalent to $131,000 in currency, spent in improving the property. It is true that this was not all produced from the earnings.

The Receiver obtained $51,000 from the Treasurer of the deft.'s Company, when he was appointed, and was indebted some $60,000 for money borrowed and other liabiliiies, when he surrendered his trust. But it is in proof that a sum at least equal to the $51,000 received from the Treasurer, was paid by the Receiver on account of the debts of the Galveston, Houston &

Henderson Railroad Company, successor. And at the time of the surrender, the road was doing a fine and increasing business.

Having come to the conclusion that the Receiver was fairly entitled to compensation, the next question is, what ought that compensation to be?

It would hardly be a proper rule for governing the case, to inquire what another even competent person would have been willing to do the work for.

The Receiver's office is not put up at auction. His compensation is not fixed on that principle at all.

The Chancellor selects a person whom he regards competent and trustworthy, and the amount of compensation is graduated somewhat by the duties, and somewhat by the responsibilities of the situation. In cases of moderate amount, five per cent. on the receipts and disbursements have been allowed, which in this case would have amounted to something like $25,000 or $30,000 a year. But where the amounts received and disbursed are large, it is not usual to allow a percentage, but to fix the compensation in some other manner. In one case it is true it was held that a Receiver who discharges his duty is entitled to the usual commissions, although they appear to be more than a reasonable compensation for the services rendered; and that it was no ground for an exception to the general rules, that the business was conducted almost entirely by overseers and factors, inasmuch as the Receiver had incurred the responsibility incident to these sub-agencies. (See Price *v.* White, 1 Baily Eq., 240, note to 3 Daniel Ch. Pract., 1986.) The information elicited by Lord Langdale, in Day *v.* Croft, 2 Beav., 488, quoted in Daniel's text, is useful on this head. "The Masters," he says, "have each of them been good enough to furnish me with a certificate, and I find there is no general rule which universally prevails as to the allowance to a Receiver, where the receipts consists of rents of freehold and leasehold estates, five per cent. upon the amount received is most frequently allowed. If there be any special difficulty in collecting the rents on account of the sums being extremely small, or of the payments being frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then

less than five per cent. is allowed, &c., one Master allowed four per cent. in one case; another allowed an amount equal to £300 a year at first, and afterwards £150 a year, and after that £50 a year for the same rents—the difficulty having been diminished by long leases. In conclusion, he says: "It appears, therefore, that the Masters, as they ought, consider upon each occasion what is fit or proper to be allowed having regard to the degree of difficulty or facility experienced by the Receiver.

Where a Receiver is a manager as well as a mere Receiver, his duties and responsibilities are largely increased; and the management of a business like that of a railroad is one of the most difficult and responsible duties that a Receiver is charged with. It requires a man of first rate qualities and attainments.

Now, we have it in proof that the Railroad Presidents of the country receive various sums from $3,000 to $20,000, a year, many of $5,000, some of $10,000, a few above $10,000. Most of the defendants' witnesses think that $5,000 a year would be ample compensation to the Receiver for his services, whilst most of the witnesses called for the Receiver think that $15,000 coin is not any too much; that he saved much more than that to the road, &c.

The Receiver's income before his appointment was, by the estimation of one witness, about $7,000, a year; said to be of a permanent character; all of which he was obliged to give up when he assumed the duties of the Receivership; and he himself says, that he would not have consented to take the office for less than $15,000 a year. The previous salaries given by the defendant Railroad Company have been referred to as being only $5,000; and sometimes not so much as that.

In view of all this evidence of the assistance which the Receiver had around him, and of the principles which the law lays down with regard to the compensation of Receiver, I am inclined to think that $10,000 in coin per annum, would be a fair rate of compensation in this case. It seems to me, that $15,000 is large, larger than what any (except two or three) of the Presidents of our most important railroads in the country receive. It also seems to me that the peculiar duties, responsibilities and accountability of a Receiver entitle him to a larger amount than would be demanded by the head officer of an ordinary rail-

road of this size and business. An allowance of $10,000 coin per annum, will, therefore, be made for the Receiver Walker's compensation during the time he was such Receiver. His accounts will be stated on that basis. If this allowance should bring the Receiver in debt to the fund, I think the complainants in the cause should make good the deficiency to the extent of the moneys paid by the Receiver to their counsel, as shown by the vouchers produced before me on this hearing, namely the payments made at the rate of $5.000 per annum

So far as the Receiver chose to pay that money out of his own pocket, it was a matter for his own consideration; but so far as he paid it out of the funds in his hands, beyond the amount which is now allowed to him, it should be returned. Therefore, any deficiency or indebtedness due from him to the fund, which may appear in making up his accounts, not exceeding the sums so paid by him to counsel as aforesaid, will be charged to the account of the present Receiver, as representing the complainants.

I do not regard it necessary to make any other order in reference to those payments.

IN THE MATTER OF MOTION TO DISCHARGE N. A. COWDREY, AS RECEIVER.

The next question for consideration is that of the motion to discharge the present Receiver.

This motion is made upon several distinct grounds which are specified therein. These grounds all relate to his conduct since his appointment. The charges are Ist. That he incited and joined in the effort to cause the abandonment and destruction of the line and track of the Galveston and Houston Junction Railway Company, thereby violating his duties as receiver This is attempted to be proved, by showing that the Receiver has privately incited the Town Council of Houston to pass an ordinance or ordinances for stopping the use of the Junction Railroad Bridge at Houston, in which the defendants claim to be interested and for abating it as a nuisance, and to give a right of way for another route through the town; and by showing that he is engaged in furthering a new connection with the Houston and Texas Central Railroad through the town, in continuation of the old track of the Galveston, Houston, and Henderson Railroad, and to the abandonment of the Junction Railroad; and that he has actually applied to the Court for leave to procure such new connection; all this is complained of by the defendants as bad faith on the part of the Receiver, as a breach of trust, as treachery towards the interests, which, by his appointment and by the terms of his bond, he was bound to protect. Now, in the first place, it is not proved to my satisfaction that the Receiver did incite the Town Council to pass the hostile ordinances referred to; as to the part taken by him in the amended ordinance, by which the city gave the

right of way to build a new road through the town, and in making application to the Court on the subject of such connection, I see nothing that renders him obnoxious to the severe censures which the defendants have passed upon his conduct. He has not proposed to do anything definitive on the subject, without the leave and order of the Court, to be made after due notice to the defendants.

This is a sufficient answer to the whole charge. Should the Court deem it for the interest of the trust to allow the Receiver to send his trains through the Town of Houston instead of over the Junction Road, I know of no reason why the Court should not make an order to that end. There seems to be no contract by which the Galveston, Houston and Henderson Railroad Company is bound to send its freight or passengers over the Junction Railroad *at all events;* and if the two interests should ultimately be adjudged distinct, as they have already been adjudged, it is hardly to be supposed that the parties owning the Galveston, Houston and Henderson Railroad will rest content to be dependent on the Junction Road for a connection with the Central Railroad, if they can help it, without some favorable and permanent contract in reference to the terms of that connection.

Other reasons have been suggested by the Receiver why a new outlet and connection would be desirable, such as the destruction of the bridge, &c., which it is unnecessary to refer to. In any view of the case I cannot see how it can constitute a crime on the part of the Receiver, in view of the possibility of such a severance as I have adverted to, to lay before the Court the facts of the case, and the terms on which a new connection can be had; especially so long as he submits himself to the orders and direction of the Court. Nor can I regard the order by which the Receiver was appointed as constituting or raising, by implication, any such agreement, to use the Junction Road *and nothing else*, by way of connection with the Houston and Texas Central Railroad, as to make it a matter of dishonesty or bad faith to apply to the Court for leave to provide an alternative connection by another route. If the defendants think that such leave would be injurious to them, and would not be a fair thing to do at this time, it is competent for them to appear be-

fore the Court and say so; and it is to be presumed that the Court will see that no injustice is done. And in judging of the Receiver's conduct it must be remembered, as has been properly said, that he is a Complainant as well as Receiver, and has rights as a Complainant which he is not bound to ignore and forget in any applications to the Court which he choses to make. And, in this connection, it is proper to remark that the whole transaction, which took place before Justice Swayne on the 19th of August, 1869, by which the defendants agreed that the complainants, on giving security to the amount of $350,000, should have the possession and management of the property and name the Receiver, places the defendants in a somewhat different attitude towards that officer from what they would be in if he were appointed by the Court in the ordinary way—it certainly does not lie with them now to object to the *person* of the Receiver unless he commits some overt act of unfaithfulness to his trust, which can be specified and pointed out. On this account, as well as on others, it seemed to me incompetent for the defendants to go into previous transactions of the Receiver, as complainant, in order to show that he had heretofore done acts which exposed him to personal animadversion. The other grounds stated in the motion are all of the same general character with that already mentioned.

*The defendants have entirely failed, it seems to me, in proving a single act of the Receiver since his appointment, which shows a want of faithfulness in discharging the duties of his trust, and in view of the terms of the order under which he was appointed, I can see no reason or ground for his removal.*

The motion is therefore refused.

### In Matter of Motion for Change of Location of Road.

The next subject to which my attention has been directed, is a motion on the part of the Receiver for an order authorizing him to procure the construction of a new connecting road through the city of Houston, to connect with the H. & Texas Central R. R. This application was made in his report of November 19th, 1869, in which he sets forth the inconveniencies and dangers of the present connection, the anxiety of the city of Houston to have the present bridge removed, &c.

This cause has been appealed to the Supreme Court of the United States, and it is expected that it will be reached for argument in January next. It is desirable that it should be disposed of at as early a day as possible, and no doubt the Court will give every facility for an early determination of the case, consistent with the practice of the Court. The decision on that appeal will determine the rights of all the litigating parties, and will terminate many questions now undecided. In view of this expected early disposition of the main cause, it seems to me inexpedient to enter upon any new expenditures of much importance until that consummation can be reached. The desireableness of many contemplated changes and improvements will depend in great degree upon the final determination of the case. I do not feel disposed, therefore, to make any order authorizing the Receiver to expend any of the trust funds for building a new road to connect with the H. & Texas Central R. R.

Should any other parties build such a connection, so that the the track belonging to the G. H. & H. R. R in the streets of Houston can be be utilized and used, and should it be shown that the interest of the entire fund would be subserved by running trains over the same instead of over the Junction R. R., it will then be time enough to consider the question. The Court cannot now make any order which should *direct* the Receiver to use such new connection, or which should guarantee to the constructors of any new road the use thereof in preference to the

Junction R. R. My impression is, that in view of all the conflicting interests represented in the case, it will be better to continue the present connection, at least, until the case shall be decided. Any saving made by the G. H. & H. R. R. by a new connection, would be attended by a corresponding loss to the G. H. & Junction R. R. Co., whose creditors and stockholders are looking to the Court for protection, and as the rights of the parties are not yet finally determined, and it is uncertain how they will be determined, it seems to me best to keep the business *in statu quo* until the final decision shall be rendered. If it were certain that the roads would be severed by the final decree, I should deem it unjust to the bond holders to keep the G. H. & H. R. R. united to the G. H. & Junction R. R. by force. But this is not certain, and therefore it is better for the Court not to take any new and radical action in the matter.

My view is the same with regard to the purchase of the bridge across Galveston Bay.

I do not think it would be right for me, sitting merely to superintend the Receiver's administration of the property, to authorize any such radical change as the purchase of the Galveston Bridge, when the whole cause will be decided and the property will be in private hands so soon, who can then do with the property as they see fit.

I therefore decline to make any order on either of these applications.

As to the application for the purchase of new rolling stock, I will make an order that the Receiver be authorized to purchase such new rolling stock, iron rails, machinery, &c., as in his judgment may be required for the proper transactson of the business, beyond the rolling stock, rails and machinery now in his possession and control under his appointment as Receiver, and as the funds in his hands will reasonably justify. Every dollar fairly expended on the road and rolling stock will be more than reimbursed by the increased value it will give to the whole property when sold.

IN THE MATTER OF THE APPLICATION OF THE HOUSTON, TRINITY & TYLER RAILROAD CO. FOR THE PAYMENT OF INTEREST ON CERTAIN NOTES HELD BY THEM AGAINST THE GALVESTON & HOUSTON JUNCTION RAILROAD CO.

If no question were made by any of the parties that the Houston, Trinity and Tyler Railroad Company have a prior lien on the property of the Junction Railroad Company for the payment of the money due the former Company, it would be a burden on the property, like a ground rent, payable in any event; and the payment of the interest on it, like the payment of taxes, would be one of the burdens to which the use of the property would be subject, in whosesoever hands it might be. In that case, the Receiver ought, out of the trust fund in his hands, to keep the interest from accruing whilst he has possession of the property, as an expense, payable like any other expense incurred in operating the road. But if the claimed priority of this debt is involved in the question of the complainants' lien on the Junction Railroad Company's property, then it should stand in abeyance until the suit is finally determined, unless the Houston, Trinity & Tyler Railroad Company, who have not been made parties to this suit, and are not bound by the proceedings therein see fit to prosecute their claim in the regular way. Should they do this, which this Court cannot well prohibit their doing, the question of the priority of that claim could be tested in such proceeding, as they could not sell the property under their trust deed whilst it is in the custody of the Court. Perhaps the best way of raising the question, if the complainants desire to raise it, would be for the complainants to answer the petition which the Houston, Trinity & Tyler Railroad Company has filed, and to raise it in their answer. But

my attention is called to the fact that the former Receiver, Mr. Walker, applied for direction as to payment of interest on a portion of this claim, and was directed, by an order of the Court, made in May Term, 1867, to pay the interest on one of the notes, which became due the 25th of May, in that year, amounting to $1,921 28, out af any surplus moneys accruing in his hands, which could be safely spared without impairing the proper operation of the road under his charge; and it is contended that this order settles the question in this cause and binds the Court. The claimants not being parties to the suit, I question whether this view of the case is correct. So far as appears, the order was made on the sole application of the Receiver, without notice to the parties; and it seems that he never did pay any money under it; and none has since been paid. Under the circumstances, I should think it would be proper to make an order to the effect that unless the complainants, by answer or otherwise, shall show cause by the rule day of July next, why the interest should not be paid, the Receiver be directed to pay it out of any moneys in his hands belonging to the trust fund. Should a question be raised for hearing at that time, and no Judge of the Court be present to hear it, it will have to lie over until a Judge shall be present, or till the next Term of the Court.

Let such order be made.

The other questions that have been submitted to me are—

1. Master Waul's report on the question of allowance to the Junction Railroad Company, for the use of its railroad, rolling stock, etc.

2. Same Report on the question of allowance to the Real and Personal Estate Association.

3. The allowance to the Galveston Bridge Company for the use of their bridge across Galveston Bay.

As no immediate action of the Receiver is dependent on the decision of these matters, no money having to be paid in the two former cases, until the final decision of the cause, and as the Court has not had sufficient opportunity to examine the papers and evidence bearing on these matters as fully as it would be desirable to make no decision on them at this time, but will hold them do, I under advisement, either to be decided as I have opportunity, or or to be handed over to the Judge who may next hold the Court at this place.

The papers will be returned to the Clerk at present, and if the parties desire that I should render a decision on these questions, they will see that I am furnished with copies of the Report, and of such documents and depositions as have a bearing thereon.

The Clerk will enter the following order.

Jos. P. Bradley.

The Court having heard the various motions and arguments submitted in this cause at this Term, and considered the same, makes the following order thereupon, that is to say:

1. It is ordered that the exceptions of the defendants to the report of Master Hughes upon the account of Tipton Walker, Receiver, for the month of February, March, and April, 1867, be disallowed, and that the report be confirmed, except as to the allowance to the Receiver for his services.

2. That the exceptions of the defendants to the report of Master Waul upon the accounts of Tipton Walker, Receiver, of the period from May, 1867, to November, 1868, inclusive, be disallowed, and that the exceptions of said Receiver to said report, so far as relates to the item of $463 55 paid for the purchase of a pair of scales, and to the two items of $125 each, paid for rent of offices, and to all items paid by him for interest on money loaned, be sustained, and the report corrected accordingly; but that the other exceptions of said Receiver be disallowed, reserving, however, the question of compensation to be allowed

to the Receiver for his services for separate consideration, and that the report be in all other respects confirmed.

3. That the exceptions to the Report of Master Austin in the accounts of the said Receiver, from December. 1868, to September, 1869, inclusive, be disallowed, and said Report be confirmed, and that the accounts suspended by him in his said Report be allowed to the Receiver, except the charges for compensation for his services, which are reserved for separate consideration, and that with this modification the said Report be confirmed.

4. That the said Receiver, Tipton Walker, be allowed, by way of compensation for his services, at the rate of ten thousand dollars a year in coin, during the time he was Receiver, and that his accounts be settled on that basis.

5. That in case said Receiver, on the statement of his accounts, as now adjusted, should be found indebted to the Trust Fund, the balance found to be due from him to said fund (not to exceed the amount paid by said Receiver to complainants' counsel, under the arrangement for $5,000 per annum, as proved on this hearing) be paid by the complainants to the fund, and charged to the present Receiver in his accounts, as representing that interest, as so much money in his hands.

6. That the motion for discharging N. A. Cowdrey, the present Receiver, be denied.

7. That the application of the present Receiver for authority to procure the construction of a new connecting road through the City of Houston, to connect with the Houston & Texas Central Railroad, be refused.

8. That the application of said Receiver for authority to purchase the Galveston Bridge, be also refused.

9. That the Receiver be and is hereby authorized to purchase such new rolling stock, iron rails, machinery, etc., as in his judgment may be required for the proper and profitable transac-

tion of the business of the road under his charge, beyond the rolling stock, rails and machinery now in his possession and control as such Receiver, and as the funds in his hands will reasonably justify.

10. That the said Receiver do pay the interest which has accrued on the two notes held by the Houston, Trinity & Tyler Railroad Company against the Galveston & Houston Junction Railroad Company, in accordance with the petition filed by the said Houston, Trinity & Tyler Railroad Company, unless the complainants, by answer to said petition or otherwise, show cause, by the first Monday in July next, why such interest should not be paid.

11. That the other matters raised and referred to the Court at this time, namely, the consideration of Master Waul's Report on the amount of compensation that should be paid to the Galveston & Houston Junction Railroad Company for the use of its railroad and rolling stock—the amount that should be paid to the Real and Personal Estate Association for the use of this property, and the amount that should be paid to the Galveston Bridge Company for the use of said bridge, be reserved for the further consideration of the Court.

May 25th, 1870.

# Supreme Court

OF THE UNITED STATES.

N. A. COWDREY AND OTHERS,

*vs.*

THE GALVESTON, HOUSTON AND HENDERSON RAILROAD COMPANY, THOS. W. PIERCE AND OTHERS.

*December Term*, 1870. *Nos.* 119 *and* 212.

# BRIEF OF COMPLAINANTS.

WM. G. HALE,

*Counsel.*

NEW YORK:

EVENING POST STEAM PRESSES, 41 NASSAU STREET, COR. LIBERTY.

1871.

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# Supreme Court of the United States.

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| THE GALVESTON, HOUSTON AND HENDERSON RAILROAD and others, *Appellants*, *vs.* N. A. COWDREY and others, *Appellees.* | December Term, 1870. No. 119. |

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| N. A. COWDREY and others, *Appellants*, *vs.* GALVESTON, HOUSTON AND HENDERSON Railroad, Thos. W. Pierce and others, *Appellees.* | December Term, 1870. No. 212. |

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BRIEF FOR APPELLEES IN No. 119; and APPELLANTS IN No. 212.

WM. G. HALE,
*Counsel.*

## Statement of Case.

These two cases are appeals from the final decree, rendered on the 19th of August, 1869, in the cause entitled in the Court below, N. A. Cowdrey and others *vs.* Galveston, Houston and Henderson Railroad Company and others; the first appeal being taken by one of the defendants to the principal portion of the decree; and the second being taken by the complainants from that part of the decree which exempted certain property and persons from liability to their claim. Both are prosecuted and will be argued together, as they are intimately connected.

The original complainants, N. A. Cowdrey, Edwin Parsons, George Parsons, Frederick P. James and Isaac Sherman, as citizens of New York and bondholders, on the 12th of February, 1867, filed their bill in the Circuit Court for the Eastern District of Texas, at Galveston, on their own behalf and for the benefit of all others having bonds, etc., for the foreclosure of three railroad mortgages and the subjection of certain property to the lien and sale, and demanding an account from the defendants. The bill avers that Wm. Kent and Chas B. Haddock, the Trustees named in said mortgages, are dead, and that Ambrose Moore and John Masterman, the other Trustees named, refused to accept the trust. (Record, p. 4.) These mortgages had been made by the Galveston, Houston and Henderson Railroad Company, a corporation of Texas; but as the property and active management of that Company had fallen into the hands of third parties claiming both as individuals and as corporate bodies, and by their interference the income of the original Company had been diverted and applied to the acquisition of additional property attached to the road, and thereby made subject to the claim of complainants, it became necessary for the latter to make such parties, defendants.

The bill therefore proceeded against not only the original Company, which had made the mortgages and issued the bonds, but also against the Galveston, Houston and Henderson (successor) Railroad Company; the Galveston and Houston

Junction Railroad Company, and Thos. W. Pierce and the various individuals therein named; the individual defendants representing a joint stock, unincorporated company, called the Real and Personal Estate Association, which virtually originated and composed the so-called "Successor" Railroad Company, and the Junction Railroad Company.

The bill sets forth succinctly the incorporation of the G., H. & H. R. R. Co.—the executon by said company of three mortgages or deeds of trust:

The first, dated December 1, 1853, known as the 1st or 6 per cent. mortgage;

The second, June 1, 1855, known as the 2d or 10 per cent. mortgage;

And the third, October 8, 1858, known as the 3d or 8 per cent. mortgage.

All duly recorded in Texas.

The issuance under such mortgages of three series of bonds, the first bearing interest at 6 per cent., the second at 10 per cent., and the third at 8 per cent., and thence known as the six, ten and eight per cent. bonds respectively; and also the various conversions and redemptions of the bonds, by which there remained outstanding about £50,000 sterling of the first, $700,000 of the second, and $2,000,000 of the third series, with the unpaid coupons.

It then proceeds to state that the object in issuing the bonds was to obtain means for the construction and equipment of the railroad, and that by such means the railroad between Galveston and Houston was actually built and placed into active operations before March 12, 1860; that the complainants hold £32,000 of the six per cent. bonds, $250,000 of the ten per cent. bonds, and a large amount of the eight per cent. bonds, with the unpaid coupons; and also that they bring this suit on behalf of all other holders and claimants of said bonds, according to their respective priorities (Record, p. 2); that the G., H. & H. R. R. Co, besides its other property, is entitled under the laws of Texas to 512,000 acres of land granted by the State, and subject to the lien of the mortgages.

The bill then states that on or about the 12th of March, 1860, various creditors of the company, having judgments against it, on claims arising subsequent to the mortgages, caused executions to be issued, whereon "a real or *pretended* sale" was made of the said Railroad Company, and "all its right, title and interest in its franchises, road-bed, track, charterered rights and privileges, and its rolling stock" (Rec, p. 5); that the purchasers at such sale transferred subsequently their rights and claims to the other defendants, who professed to become thereby the Successor Galveston, Houston and Henderson Railroad Co., and for the purpose of delaying the enforcement of the mortgages and to defraud the bond creditors, organized themselves into a company, under the name of the Real and Personal Estate Association, and in that character purchased property with the income of the Galveston, Houston and Henderson Railroad, and for the use of it by said road, charged a large compensation; that the same parties also obtained a charter for a railroad company called the Galveston and Houston Junction Railroad Company, which, by the use and application of the earnings of the G., H. & H. R. R. Co., constructed a railroad about 1¼ miles in length from the terminus of said G., H. & H. R. R., in the City of Houston to the Texas Central Railroad, also in said City; that also, the same parties, as members of said association and stockholders in the so-called Successor Company, and in the G. & H. Junction R. R. Co., purchased equipment in the name of said Junction Company, and paid for the same out of the earnings of the G., H. & H. R. R. Co.; that these parties are all members of said association and of the new companies, and represent one and the same interest; that in particular, the Galveston and Houston Junction Railroad Company has less than two miles of road—its capital stock is nominally $500,000, but little or none of it is paid up—all or nearly all of its assets have been acquired with the income of the G., H. & H. R. R.—but that said Junction Company operates the whole of said last mentioned road, and takes all its receipts, and with them buys additional equipment and supplies, in its own name, and that in law and equity, its entire property is covered by the mortgages sought to be foreclosed.

The bill then states that the several companies composed

of the individual members of the Real and Personal Estate Association, have appropriated to their own use all the tolls, rents and income of the Galveston, Houston and Henderson Railroad mortgaged to the bondholders, amounting, from the 12th of March, 1860, to February 1st, 1867, to the sum of $3,500,000; that nevertheless they have not kept the road in proper repair—that the mortgaged property, as now managed, is an inadequate security for the bonded debt, and is steadily diminishing in value by the action of the defendants, who seek to depreciate and exhaust it; that they, in their several capacities, set up claims upon the mortgaged premises, but the complainants are not informed whether such claims are well founded or not, nor whether the companies, composed of the defendants, have any corporate existence or not; but they charge and allege that said companies are not corporations, but mere associations or copartnerships formed for the purpose of defrauding the bondholders, and that the defendants, have no just or valid claims superior to those of the complainants; and that the defendants have not rightfully acquired either the title to or the possession of the mortgaged premises.

To the Bill are annexed copies of the three mortgages sought to be foreclosed.

For a copy of the 1st, or 6 per cent. mortgage, see Rec., p. 9.

For the 2d, or 10 per cent. mortgage, Rec., p. 13.

For the 3d, or 8 per cent. mortgage, Rec., p. 18.

The premises embraced in the first or six per cent. mortgage, are described as follows, viz.: (Record, p. 11.) "The railroad constructed, and to be constructed from Galveston to Houston aforesaid, together with all and singular the railways, rails, bridges, fences, privileges, rights and real estate now owned by said Company, or which shall hereafter be owned by them in connection with said railroad from Galveston to Houston, *and all the tolls, incomes, issues and profits*, whenever the party of the first part (the R. R. Co.) shall be in default of making payment, to be had from the same, and all the franchises of the said Company, and all the lands used and occupied, or which hereafter may be used and occupied for

railway depots or stations, on said road from Galveston to Houston."

The second, or ten per cent. mortgage, is on the same premises, and described in the identical language used in the first, or six per cent. mortgage, with the addition of the following language :

"And all the lands which shall or may belong to said Company by virtue of any Act of the Legislature of Texas, in connection with said road from Galveston to Houston." (See Record, p. 13.)

The third or eight per cent. mortgage, is on the same premises described as above set forth in the six and ten per cent. mortgages, but instead of saying from Galveston to Houston in the eight per cent. mortgage, they say, "from Galveston for the full distance of seventy-five miles."—(Record, p. 18.)

All three of the mortgages embrace "*all the tolls, incomes, issues and profits.*"

A Subpœna to all of the defendants was issued Feb. 12, 1867, and served on the Galveston, Houston and Henderson Railroad Company, (original) "by delivering a certified copy" "to Wm. R. Smith, the President of said Company," and also on the Successor Company, and the Junction Company, by delivering copies to George B. Nichols, the President of both these Companies, and on the individual defendants personally. (Rec. p. 24).

Sundry proceedings were afterward had in regard to the appointment of a Receiver upon the application of the complainants, and upon numerous affidavits filed by both parties, and the answers and pleas of the several defendants. After repeated consideration, Tipton Walker, Esq., was appointed and subsequently retained as Receiver of all the property claimed by the Successor Company, and the Junction Company, with authority to administer the road, and to operate it, and also, to make suitable arrangements for the use of the railroad bridge across Galveston Bay, belonging then to the City of Galveston, and for the depots, machine shops, and grounds claimed by the Real and Personal Estate Association, (Record, p. 43).

It is unecessary here to refer particularly to the proceedings connected with the appointment and action of the Receiver, because such proceedings are, in general, exclusively within the control of the Circuit Court, and not a matter of revision for this Court.

The defendants, except J. W. Jockusch, filed their demurrer, and the latter filed his disclaimer (Record, pp. 49, 51,); but at the May Term, 1867, the defendants demurring, obtained leave to withdraw their demurrer, and to file their answers, which were accordingly filed on the 30th of May, 1867 (Rec, pp. 63 to 101); but William R. Smith, one of the defendants, filed on the same day a special plea to a part of the bill, in the nature of an objection to the service made upon him, on the ground that the original Company, of which he had been the President, had ceased to exist in consequence of the sale made in 1860, (Rec. p. 108). On the 5th of June, 1867, the Circuit Court allowed the disclaimer of Jockusch, but overruled the plea of Smith, and required him to answer further (Rec., p. 125), which he accordingly did on the 13th of June, 1867.

Meantime, Phillip C. Tucker and Robert Pulsford had on the 31st of May, 1867, presented a petition to be admitted as defendants, and to file a cross-bill for the purpose of protecting their separate interests, (Rec., p. 109). It appears rather indistinctly that this application was granted; and the answer of Tucker and Pulsford, and also their cross-bill against the complainants, were filed, (Rec., pp. 127-135). Replications were duly filed by the complainants to the several answers (Rec., pp. 156-159); and the answer of the complainants to the cross-bill was also filed in December, 1867 (Rec., p. 163), but to be considered as filed as of the first Monday of September, 1867 (Rec. p. 186). The replication of Pulsford and Tucker to this answer was filed February 1st, 1868 (Rec., p. 214). The cause was thus at issue, and both parties proceeded to take testimony under various agreements. Numerous applications for interlocutory relief were made before the hearing, but it is unnecessary to allude to them further at present, because they are immaterial to the merits of the cause, and cannot be determined, properly, until the rights of the parties shall have been fixed by the decision of this Court.

Nor is it necessary in this part of the case, to state in detail the allegations in the several answers; as they can be better reviewed while adverting to the particular points. It is sufficient now to say that the answers set up the invalidity of the mortgages sought to be foreclosed—and aver the validity of the sale made in March, 1860, the right of the defendants to acquire the property then sold, disencumbered of the mortgage lien—the exemption, at any rate, of the new property acquired since 1860, from any liability under the mortgages.

The answers admit that the Successor Company, the Junction Company, and the Real and Personal Association are composed of identically the same members, and were mere organizations for the purpose of protecting the associates against the enforcement of the mortgages.

The answer and cross-bill of Tucker and Pulsford set up a fourth mortgage made in 1859, by the original company, to secure Pulsford for certain advances all made subsequent to the three first mortgages, and for the payment of which he was to receive 40 per cent. of the gross earnings of the Company, and also, certain judgments rendered against the Company, to be assigned to him, or, at his election, certain bonds of the last issue. (Rec., p. 111.)

The testimony in this cause was to a great extent, that of the parties interested in its prosecution or defence; but, while we must, therefore, expect the best representation of their case to be made by the complainants and defendants; yet, the admissions upon both sides are sufficiently complete to place all the facts before the Court, and to leave nothing but questions of law to be decided.

The decision of the Circuit Court was rendered at Galveston, July 11th, 1868, and amounted to a foreclosure of the three first mortgages for the sum then found to be due in the aggregate, $5,443,739, subsequently corrected on account of a clerical error, by reducing the amount $5,263,039 (Rec. pp. 275 and 1012).

A reference to Special Master, T. N. Waul, Esq., directed by the decree, for the information of the Court, was duly had, and a large amount of documentary and other evidence was collected by Auditors and by the Master, (Rec., pp. 802 to 912).

Statements of the views of the several parties as to the result of this evidence, and the proper report to be made by the Master, were placed before him in due time, and objections and exceptions were filed by Complainants, (Rec., pp. 913 to 930).

The whole of this evidence, together with other testimony taken by consent, was submited without argument to Associate-Justice Swayne, who rendered the final decree on the 19th August, 1869.

By that decree, the original decree of the Circuit Court, was confirmed and repeated so far as related to the foreclosure of all the mortgages, fixing their priorities according to date, and subjecting to their lien the whole road from Galveston to Houston, with the original rolling stock and equipments. But the decree went, also, to the effect of refusing any remedy by account, or an enforcement of the lien against any of the property acquired and used in connection with the road since March 6th, 1860, in the following terms, viz. (Rec., p. 1013):

"And it is further ordered, adjudged and decreed, as to the several matters reserved and not decided in the said former decree of this Court, and upon the subsequent proceedings thereto, by and before the auditors and master appointed, directed by said decree, and upon the pleadings, proofs, evidence and reports in this cause thereon; that the order entered at the April rule day, 1869, in the clerk's office, confirming the report of the special master in chancery, as to his conclusions on the inquiries proposed in said former decree, be set aside; and that, in consideration of the exeeptions of said complainants to said special master, said report, and the evidence, it appears to the Court, and the Court so finds, that no case has been made by the pleadings or proofs, entitling said complainants to an account against any of the individual defendants, or against them in their associate or corporate capacities as the Real and Personal Estate Association, the Galveston and Houston Junction Railroad Company, and the Successor Galveston, Houston and Henderson Railroad Company, of the rents, income, issues and profits of the property claimed by them, as acquired after March 6th, 1860, or of the Galveston, Houston and Henderson Railroad while occupied and used by them since said date, and

up to the filing of the bill of complaint in this cause; and, further, that no case has been made requiring to be subjected to the lien of the mortgages or deeds of trust, asserted and shown by said complainants, the said rents, issues, incomes and profits, or the said property acquired by said defendants since the said 6th day of March, 1860.

"Wherefore, the said complainants' bill of complaint is now dismissed without costs, so far as it relates to and asserts their right to such accounting, and to the liability to said mortgages and deeds of trust of said property acquired by said defendants in their associate and corporate capacities as aforesaid since said date, to wit: The real estate, lots, lands, machine shops, station or depot houses, engine houses, warehouses and other buildings erected by the members of the said Real and Personal Estate Association, at the city of Galveston, aforesaid, the rolling stock acquired by the said association or the Galveston and Houston Junction Railroad Company since the date aforesaid, and the lands, track, rails, depots, and machine shops and warehouses in the city of Houston and State of Texas, acquired or erected by the said Galveston and Houston Junction Railroad Company since the date aforesaid, and the amount of money on hand, taken into his possession by the receiver in this cause, less the payments legally made for liabilities then due and owing by the defendants, and that the present receiver, or whoever hereafter, under the authority of this Court, may be in the proper charge and custody thereof, shall deliver said property, as to which the said bill is dismissed, to the respective defendants owning the same, and that just compensation for the use, rent and hire, and deterioration of all the property claimed by the Junction Railroad Company, and Real and Personal Estate Association hereby declared not to be liable to the mortgages set up by the complainants, and taken into possession of the receiver, from the time the possession was taken to the final determination of the cause, shall be paid to said defendants and the said amount of compensation, unless paid by funds in the hands of the receiver, shall be a first lien on all the mortgaged premises now ordered to be sold, to be paid prior to the mortgaged debts; and the amount properly due for such compensation shall be determined by this court, in such manner, and at such time as may be necessary to protect the rights of all parties hereto; and as to the said Galveston and Houston Junction Railroad Company, and all the individual defendants herein in their individual character, the complainants' bill is dismissed without prejudice to the proper effect of the decree of foreclosure herein rendered."

From this final decree the successor Galveston, Houston and Henderson Railroad Company appealed to this Court at the December Term, 1869; (No. 119), the complainants took a cross-appeal, also to this Court at the same Term (No. 212), each appeal to act as a supersedeas to so much as was complained of, (Rec., pp. 1015 and 1018). Tucker and Pulsford prayed for an appeal, but that appeal has never been placed upon the docket of this Court. No appeal has been taken from so much of the decree as forecloses the mortgages on the lands donated by the State of Texas, (Rec., p. 1016).

By consent of the principal parties, an order was made at the time of the appeal to place all the property in controversy under the charge of the complainants, or their appointee as receiver, in place of Mr. Walker, until the final determination of this cause in this Court. Mr. N. A. Cowdrey was appointed receiver under this order and gave bond in the sum of $350,000. (Rec. pp. 1015, 1016, 1024, 1025).

The cause is thus ready to be presented to this Court.

## Statement of Testimony.

### FORMATION OF COMPANY.

1. The Galveston, Houston and Henderson Railroad Company was incorporated by an Act of the State of Texas, approved February 7, 1853, (Rec. pp. 64, 81). It was created for the purpose of "locating, constructing, owning and maintaining a railway, commencing at the city of Galveston, crossing Galveston Bay so as not to obstruct or unreasonably impede the navigation of the same, and thence running by such course and such point at the city of Houston as said company shall deem most suitable; thence by the most suitable and direct line to Henderson in Rusk County, and with the further privilege of making, owning, and maintaining such branches of said railway as they may deem most expedient."

Its corporate powers were vested in William C. Lacy, T. P. Anderson, R. A. Harris and William M. Tuck, their associates and successors (Rec. p. 81,) with power to form the first board of directors and fix the time for new elections. (Rec. p. 82.) The board of directors appear to have been organized in 1853, according to the deposition of Kimball (Rec. p. 401,) and the cash book (Rec. p. 679). During the remainder of that year there appears to have been but little done except the subscription of about $85,000 in stock, taken by contractors and officers in payment.

The difficulty of negotiating railroad securities was then and afterward very great, as is explained in the depositions of Valentine (Rec. p. 326; Kimball, p. 450; Wheelock, p. 361; Bean, p. 369; Geo. S. Coe, p. 477; Davis, p. 478,) and in general, by the whole history of this cause.

### SIX PER CENT. OR FIRST MORTGAGE BONDS.

The first, or six per cent, mortgage was executed December 1st, 1853, and recorded on the 3d day of January, 1854, in the County of Galveston; deposition of Farish (Rec. pp. 333, 336).

This mortgage was given to secure the payment of an issue of £150,000 in bonds, in sums of £100 each, payable

on the first of December, 1873, with interest payable semi-annually, at the banking house of Messrs. Masterman, Peters, Mildred & Co., in London, to become absolutely due upon the failure, for the space of three months, to pay either principal or interest. The deposition of Valentine states the disposition made of them, and it appears that £4,400 were sold for cash, at about 80 per cent.: that £64,800 were deposited with the London and Eastern Bank, under an arrangement made by George Thomas Braine, the Agent of the Railroad Company, who had borrowed large sums from said bank for said Company; £30,800 were canceled by an exchange for $154,000 ten per cent. bonds under the second mortgage, the remainder of the 6 per cent. bonds were never used. (Rec. pp. 324–5.) It appears by the testimony of D'Alton Shee, (Rec., p. 729,) that before November, 1859, a number of the 6 per cent. bonds had been, or were to be, redeemed; and by the testimony of Wheelock, (Rec pp. 360, 361,) that there remained outstanding of the 6 per cent. bonds, not canceled, four hundred and ninety-six, equivalent in principal to £49,600 of which $4,400 had been sold outright, at 80 per cent.; the remainder had been transferred as collateral security to London banks, under an arrangement made by agents of the company. It also appears from the cash book of the company, offered by the defefendants, that, up to November 7, 1855, from subscriptions, sales and loans, about $325,000 had been expended, none of which could have come either from the 10 per cent. or 8 per cent. bonds, (Rec., pp. 679, 673).

### TEN PER CENT. OR SECOND MORTGAGE BONDS.

The ten per cent. mortgage was executed on 1st of June, 1855, recorded November 6, 1855, in Galveston County (Rec., pp. 340, 345). It was intended to secure the payment of $750,000 in bonds of various denominations, bearing interest at 10 per cent., payable semi-annually; and the principal payable on July 1, 1865. Its provisions are nearly identical with those of the first mortgage; and the object of making it ap-

pears to have been, by offering a higher rate of interest, and an express lien upon lands granted to the company by the State of Texas, since the execution of the first mortgage, to enable the company to redeem the same, and to consolidate all the debt of the company. This course was advised by the agents of the company in Europe, and the bonds thus issued were negotiated by those agents as follows: $231,700 in Europe, at 80 per cent. cash; $154,000 to redeem a like amount of 6 per cent. bonds from the London and Eastern Bank; $34 300 paid to Braine, for indebtedness to him; $50,000 paid to Condor, Good & Co. for iron rails purchased for the company, and $250,000 to Messrs. Pignere & Co through M. Micard, for an advance of 1,000,000 Francs, say, $200,000, which makes $750,000 orignally issued. (Depositions of Valentine, Wheelock and D'Alton Shee, Rec., pp. 325, 361, 716.) In this manner, the company realized about $450,000 in cash, besides taking up indebtedness to the amount of $188,300. This money was applied to the construction of the road as appears from the cash book, and to the purchase of the necessary iron. The only definite testimony as to the amount outstanding of the 10 per cent. bonds is that of Wheelock (Rec., p. 361), who states that the whole issue is still out, although it is possible from the deposition of Kimball, and that of Shee, that some few of them may have been redeemed with 8 per cent. bonds.

It appears, therefore, from all the evidence, that before the issuance of the 8 per cent. bonds, the company, by negotiating the bonds under the two first mortgages, to the amount £49,600 and $750,000, had succeeded at the period of the greatest depression ever known in railroad securities, in building over an uninhabited swampy prairie, (and with the opposition of the merchants of Houston and Galveston, interested in a rival steamboat line) twenty-five miles of railroad fully ironed, and not expected by the bondholders themselves, to cost less than $40,000 per mile. Negotiations resulting in such a work, cannot be said to be ill-judged, or contrary to common railroad experience, especially as the company obtained, in addition from Texas, the right to a donation of 26,000 acres of land.

EIGHT PER CENT. OR THIRD MORTGAGE BONDS.

Notwithstanding the favorable position thus occupied by the Company, it became necessary in the spring of 1857, to complete an additional 15 miles of its road by the first day of November of that year, making 40 miles in all, so secure its charter from forfeiture, and to obtain the additional eight sections of land to be donated by the State ; and the Company was thus compelled to yield to the pressure, and fell into the power of what is called the European Board or Paris Committee, (Rec. pp. 86, 716, 717). This Board was formed through certain agreements with the former European agents of the Company, and Messrs. M. Micard and Pignere & Co. and others, by which a kind of provisional committee was formed, with Count D'Alton Shee as president. Mr. Kimball, the President of the Company, and the Board of Directors were forced to agree to issue and place in the hands of the European Board, 8 per cent. bonds to the amount of $2,625,000, for which the Company were to receive $300,000 as an advance to complete the 15 miles, and the remainder was to be expended under the direction of the European parties to complete the connection with Galveston, and about 35 miles further, making in all 75 miles on the route to Henderson.

In order to secure this new issue of bonds to so large an amount, it became necessary for the Company to execute a new mortgage, (dated October 8, 1857, and recorded June 24, 1859), upon this railroad for the distance of seventy-five miles, and upon their donations of land from the State, and all the property previously mortgaged by the six per cent. and ten per cent. mortgages, and practically of the same purport and effect as those mortgages. The bonds were to fall due on January 1, 1869, and the interest to be paid semi-annually, and they were to be used in part for the purpose of redeeming the six and ten per cent. bonds recently issued.

Various negotiations by the European Board with the Railroad Company and others, resulted in placing in the hands of the Committee 18,204 ($1,820,400) of these eight per cent. bonds (Rec., p. 729), which were partially sold, partially used as collateral security, and the remainder paid for sundry claims

and commissions; thus leaving in the hands of the Railroad Company, apparently, 8,046, ($804,600), of the same bonds—some of which were probably afterward used, since by the testimony of Wheelock, (Rec., p. 361), $1,900,000, or 19,000 of the bonds were actually issued, and are outstanding.

The Company was from this time in the hands of the Paris agents and its organization was, to a great extent, controlled by them.

### Claim of Pulsford & Tucker.

There remained to be completed five miles of the road upon Galveston Island, from the City of Galveston to the point at which the long railroad bridge crosses Galveston Bay, in order to form a connection between Galveston and Houston, without which the road would be unprofitable. The European Board, not having furnished all the iron necessary for this part of the route, the new Board of Directors of the Galveston, Houston and Henderson Company contracted with Robert Pulsford, who then had at Galveston some railroad iron, and £10,000 in money, to advance the same to the Company, and an agreement was made by the Company with Mr. Pulsford, dated May 21, 1859, (Rec., p. 762), and afterward carried out by deeds of trust or mortgage made to Philip C. Tucker, as Trustee, dated July 28th, 1859, by which forty per cent. of the gross income of the railroad as far as Houston, and also, in case of default, the entire line of the railroad, with all its property, were mortgaged to secure the payment of previous advances of said Pulsford, to the amount of £9,686, and a present advance of £10,000 in addition. It appears that Pulsford held, as security for his previous advances, eight per cent. bonds equivalent to £18,400, and a Bill of Lading of 497 tons of railroad iron lying at Galveston, all turned over to him by the European Board, and that his advance of £10,000 was to be further secured by £20,000 in 8 per cent. bonds and by a judgment for the balance remaining due after purchasing for his account previous judgments rendered against the Company to the amount of $10,245 66, (Rec. pp. 762 to 773).

By the use of the balance of the £10,000, thus remaining, and the railroad iron, already mentioned, and also $20,000 appearing to have been contributed by subscription in Galveston, the five miles of railroad between the City of Galveston and the long bridge, also, the laying the iron upon the bridge, were completed, February 1st, 1860 (Rec., p. 780). It does not appear by any evidence whether Pulsord took any steps to compel the payment of the 40 per cent. of the gross earnings; but it is clear that he did not attempt to preserve any construction lien, and also, that he consented to the sale made in March, 1860, upon simple judgment debts, by ranking his own claim with theirs, and coming in with the other simple creditors to receive payments from the Successor Company, (Rec., pp. 788–792).

CLAIMS OF JUDGMENT CREDITORS.

In completing the two miles and a half or three miles of the road, from the termination of the forty miles to Houston, and also, in the course of construction of the five miles from Galveston to the bridge, and in the storage and receipt of the railroad iron, and various commissions and charges, a debt was incurred to about twenty persons, which the European Board thought it had already paid, but which, to avoid local opposition, and to gain time, the Company was induced to put in the form of simple judgments. This indebtedness, including the last advance of Pulsford, already merged in a judgment, amounted to from $195,000 to $228,518 16, (Rec., pp. 488–492–417–419 to 468).

All of these claims originated after the execution of the several mortgages, and the issue and delivery of the bonds; and the judgments were rendered at various times from Dec. 29, 1858, to July 13, 1859, by the District Court of the State of Texas for Galveston County. The earliest of these judgments, six in number, amounting to $10,245, had been assigned by agreement to Robert Pulsford (Rec. p. 763), and the remainder had, by an agreement, made in the case of Shackelford against the Galveston, Houston and Henderson Railroad Company, dated July 5, 1859, (in which J. L. Briggs, the Vice-President of the Railroad Company and one of the defendants herein, acting for the Company, and the individual creditors were parties), been

extended or postponed by a stay of execution for one year—that is, until about July, 1860, (Rec., pp. 465—466). The claims upon which these judgments were rendered, were very much exaggerated, owing to the desire of the Company to gain time, and their pecuniary embarrassments (Rec., p. 288), and might, if resisted, have been reduced one-third. (Rec., p. 288). The Company was induced to suffer these judgments to be rendered, in expectation of obtaining this stay of twelve months, in which to obtain money to pay them, and to continue the Road toward Henderson through a negotiation then going on in Europe, (Rec., p. 288). But in this expectation the Company was disappointed by the bad faith of the judgment creditors, who did not observe either the agreement, or the terms of their judgments in regard to the extension to July, 1860, but immediately after the completion of the road in February, 1860, caused an execution sale to made under certain of said judgments, on the 6th day of March, 1860, (Rec., pp. 561—562). At this sale, Benjamin F. Terry, bid the sum of $28,000 for property which had cost $3,000,000 (Rec., p. 714), and a conveyance was made by the Sheriff of Galveston County to him of the road-bed, track, franchise and chartered rights and privileges of the said Galveston, Houston and Henderson Railroad, also, two locomotives, fourteen platform cars, one second class passenger car, and one hand car, (Rec., p. 562). The writs of execution, under which such sale was made, the return thereon, and the Sheriff's deed were never returned to the District Court, nor were the judgments or deed recorded in the County Court, until after the commencement of this cause, but were studiously concealed for purposes hereafter to be seen, (Rec., pp. 334—418),

Terry paid no money on account of his bid except the costs of Court; and credit was given on the several executions *pro rata*, for the amount bid, (Rec., p. 295.) No return was ever made on said writs at any time, (Rec., p. 560.) At the time of his bid, Terry was acting as Trustee for the creditors, or owners of the judgments, (Rec., p. 566), and immediately after the sale the judgment creditors had a meeting at which it was agreed that the creditors should transfer the railroad for a consideration of part cash and part a per centage of the future earnings of the road (Rec., pp. 557, 486, 489–490). The exact terms of this

arrangement are stated in the book of proceedings of the associated judgment creditors, on March 10th, 1860, (Rec., p. 489) as follows:

"The present owners of the G., H. & H. H. R. claiming to be judgment creditors of said road, including those known as the loan creditors, shall transfer said road, together with the judgments against their old company, to the following persons, to wit: T. H. McMahan and others. Immediately after said transfer said above-named persons shall organize a new company, and shall pay to said creditors 10 per cent. in cash upon the amount of their respective claims, and shall also make and deliver a trust conveyance of said road to secure the balance due to said creditors; to pay twenty-five per cent. of the gross earnings of said road each and every month until the amount due each be fully paid, said 25 per cent. to be divided *pro rata* among said creditors."

In these transactions Pulsford united and thereafter never claimed any lien except as a judgment creditor, (Rec., pp. 490, 491, 788).

No actual transfer of title or conveyance of premises was made by Terry of whatever rights he may have acquired at the execution sale, (Rec., p. 334); but it seems to have been assumed that he could associate with him others, who thereby became legal co-proprietors; and the judgments to the amount of about $200,000 are said to have been transferred to T. H. McMahan J. L. Briggs, Julius Kaufman, J. C. Kuhn, A. F. James, George Ball, Jas. Sorley, T. J. League, attorney for R. Pulsford, and W. J. Jones. (Rec. 490.) But such changes were made, that on March 23, 1860, the interests of all parties claiming under the creditors were concentrated in the persons who formed the so-called successor Galveston, Houston and Henderson Railroad Company, the Real and Personal Estate Association, and the Galveston and Houston Junction Railroad Company, in which Pulsford originally had 116 votes, or about one-eighteenth interest ($\frac{1}{18}$) in the whole. (Rec., pp. 490–493.) At the meeting at which this organization was made, it was resolved, (Rec., p. 492):

"That the capital stock of this company be, and the same is

hereby, fixed at the actual amount, and approved and admitted debt of the old company heretofore exhibited and rendered against them, to wit, two hundred and twenty-eight thousand five hundred and eighteen dollars and sixteen cents, and that said stock be issued in shares of one hundred dollars each, to simplify and represent the aforesaid interest and distribution among the owners of said road, its franchises, road-bed, rolling stock, &c., in proportion to his or their respective interests,"

and the following persons (most of whom were directors and trustees in the sold-out company), (Rec., pp. 492, 493), were elected directors:

Alfred F. James, T. H. McMahan, L. M. Hitchcock, J. C. Kuhn, J. Kauffman, J. Sealy, J. L. Briggs, J. Sorley, E. B. Nichols, J. J. Hendley, and Robt. Mills.

They will be found hereafter to be the principal members of the three associations who are made defendants in this cause, viz:

1*st*.—The Successor Company, Defendants.

The persons claiming to be stockholders and directors of the new Company thus formed by the judgment creditors and their associates, profess to derive their title under an Act of the State of Texas, passed Dec. 19th, 1857, (Paschal's Dig., art. 4909–4919) authorizing the sale of a railroad and its franchises by a judgment creditor, and they now claim that, by virtue of this act and said sale, they are constituted a Successor Company under the acts of incorporation of the Galveston, Houston and Henderson Railroad Company, and invested with the franchises, rights and restrictions specified in said acts, (Answer of Defendants, Rec., p. 68,) and that they are by said act of 1857, released from the debt of the original Company, which, therefore, is to be satisfied only out of the property not then sold—that is, the 512,000 acres of land scrip donated by the State. But, in singular contradiction to this position, they assume the floating debt of said Company as their own stock to the amount of $228,000; they abandon all recourse on the lands; and they claim that, as they are not accurately informed of the amounts due upon the mortgage liabilities of the Company, or of the respective priorities

of each series of obligations, they are authorized to remain in possession and management of the Railroad, and in the receipt of its revenues without regard to its mortgage liens.

It is, in other words, a contest between the purchasers of the floating debt, who are, by the act of 1857, required to look to the outside property for their payment, and the holders of the mortgages, who have an existing and privileged lien upon the property sold.

The Company thus formed, using the name and franchises of the Galveston, Houston and Henderson Railroad Company, remained in possession of the Railroad, and the property annexed to it from about the 6th or 23d of March, 1860, to the 23d of February, 1867—a period of 7 years—during which time it received about $5,000,000, (Rec., p. 825); and while the nominal stock of the Company was the amount of the judgment debt, $228,000, only $19,400 was, in fact, paid in, and the remainder of the means required to operate and manage the Road was supplied by the same stockholders, in the name of two other associations, under the style of the Real and Personal Estate Association, and the Galveston and Houston Junction Railroad Company.

The defendants claim loudly in their answers that the Successor Company was insolvent, and had no means or credit whatever, even sufficient to purchase $19,000 in value of Railroad iron, (Rec. pp. 89, 90,) while at the same time the same stockholders constituted the other two associations, and were willing to lend to the Successor Company, made up of themselves, more than $100,000 at a time, in money and hire.

*2d.*—The Real and personal Estate Association, Def'ts.

This private society was composed of identically the same persons who entered into the speculation of the Successor Company, and was formed in March, 1860, but the first notice of it which appears in the record is on the 21st of April, 1860, (Rec. pp. 493–494,) when it was reported by the Successor Company that they had borrowed from that association $50,000, and on

the same day, instead of using this money for the purpose of purchasing the necessary equipment and station buildings, it was resolved by the Successor Company to hire them (Rec., p. 494,) and the Company, therefore, proceeded to hire from the Association all the rolling stock whatever, as well as the machinery, tools and station buildings needed for the Road, at such exorbitant rates as to keep the Company constantly in debt to said Association for equipment alone, and to make the expenditure of $3,000,000 upon the Railroad itself of no value whatever. So far was this carried as to transfer the cars built originally by the Successor Company to the amount of $17,576 87 (Rec., pp. 40, 839) to the account of the other associations, and then to charge from 30 to 50 per cent. per annum for such expenditure.

A proper charge would have been 15 per cent. per annum. (Testimony of Mitchell & Dunlap. Record, pp. 1032, 1033, 1037.)

The defendants nearly all testify for themselves in regard to their objects in forming these outside associations; and it is curious to observe the difference between the testimony of those now directly interested in this cause, and those who have been released from it by a sale to others. The depositions of the first class are literally the same in language; and it is sufficient to refer to that of Mr. Sealy as a specimen, (Rec., 647:)

"After the transfer of the road, in March, 1860, a new company was organized, and this new company paid the judgment creditors ten per cent. in money, and assumed the balance of the judgment debt and interest, amounting in all to about $194,500 [dollars,] and also assumed about $34,000 for money, &c., loaned in 1859 by the citizens of Galveston for repairs of the road, and which was an indebtedness against the road, but not in judgment—total amount about $288,000—and agreed to pay twenty-five per cent. of the gross earnings on account of said claim; and in order then to enable the road to operate it was necessary to put the track in repair, to buy rolling stock, depot grounds, and build depots, machine shops, &c., buy machinery, &c., for the use of the road; for this purpose a large amount of money had to be raised, or the road would still be a failure; and to secure these advances of money and the prop-

erty thus acquired against danger of the liabilities of the old company, except such as they assumed, (as the opinion was very general that great frauds and irregularities existed in the old company, and the bonds or liens on the road were not believed to be valid as business obligations,) and to guard the actual outlay for additional property from those liabilities, complications, and controversies which might arise therefrom, an association was formed under the name and title of the R. & P. E. Association, and trustees appointed. The capital stock of this association or company was 1,945 shares of $100 each. The individual members of the R. and P. E. Association paid ten per cent. in money to the new G., H. and H. Railroad Co., which amount was paid by the railroad company to the judgment creditors, as will appear by the books of the railroad company; then they paid into the R. and P. E. Association seventy-five per cent. in money; with this money and its credit it bought lands for depots, built depots, bought rolling stock, machinery, tools, &c., and loaned money to the G., H. and H. Railroad Company to buy iron, ties, &c., and to put the road-bed in order, as will appear by the books of the association."

In contrast with Mr. John Sealy, it is well to note the answer of Mr. James Sorley, who had been at the earliest time, interested in the Successor Company, and was well acquainted with its operations. (Rec. p. 610.)

"Answer to the 15th interrogatory. Immediately after the organization of the new company, in 1860, the chief engineer was directed to furnish estimates of the quantities and kinds of materials necessary to put the road in suitable condition for safe and prompt transportation of passengers and freight. Large purchases of materials were made, the particulars and cost of which I have no means of stating. These materials were necessary to put the road in safe running order. The money was obtained, to the best of my recollection, by installments paid from time to time by the members of the Real and Personal Estate Association to the trustees of said association.

"The title to lands, houses, rolling stock, shop, tools, and materials bought with said money was taken in the name of said Trustees, for the following reasons: for some years prior and up to 1860, some of the officers and agents of the original G., H. & H. Railroad Company had spoken freely with citizens of Galveston, about their varied successes and difficulties in raising money for the completion and successful operation of the road. From those sources of information, it was believed that a very large amount of bonds had been issued; that these bonds were

of two or three different classes; that these classes were not equally meritorious as regarded priority of lien; that the holders of some of these bonds were dissatisfied with the terms and conditions on which some other holders had acquired possession and ownership of bonds; that, owing to these and other causes, the Company was unable to raise funds, and was, in fact, virtually bankrupt. This opinion was strengthened by the fact that many contractors and employees of the Company in Texas remained unpaid their just dues, and had been compelled to bring suit, obtain judgment, and make sale, under the laws of Texas, of all the rights of the Company to the franchise, road bed, track, right of way, and other property of the Company. At the Sheriff's sale these creditors became the purchasers and owners of the franchise, &c. Having possession of the road, it was necessary to expend a large sum of money to repair and equip it before they could hope to receive anything from the income. Many of these had no money to invest, but were in want, and anxiously trying to sell their interest in the road. At this juncture a number of merchants and property-holders in Galveston, who had a commercial interest in the completion and successful operation of the road, associated together and purchased the interest of most of these judgment creditors, and organized as the Galveston, Houston and Henderson Railroad Company, under the laws of the State. In making this purchase they were aware that they would have to expend much money to equip and stock the road, provide depots, machine shops, &c., &c., before they could expect the patronage of the public, either in freight or passengers. They were afraid, also, that the property they had purchased was subject to any pre-existing mortgages made to secure the payment of principal and interest of the bonds issued by the sold-out Company. They feared that every dollar they expended on the track, road-bed, &c., or invested in the name of the G., H. & H. R.R. Co. might also become subject to said mortgages, and that whenever the property should be sold under the mortgages, the reimbursement of their outlay was far from certain. They therefore, as prudence dictated, organized themselves into a Real and Personal Estate Association, nominated three of their number trustees, furnished these trustees with funds for the purchase of property, building, rolling stock, &c., and as far as practicable, took the title to all the property so acquired in the name of these trustees."

It appears, therefore, from the whole record, and is acknowledged in the answers that the object in forming those new associations, by which the railroad was to be worked and managed, was to shield both the investments and the returns of the stock-

holders of the successor Company against any claims existing under the mortgages.

The Real and Personal Estate Association purchased eight blocks of ground in the City of Galveston, near the railroad terminus, of which only four were used for railroad purposes. On these wooden buildings were erected for warehouse and machine shop, and the whole was leased to the Successor Company at a rent of about fourteen per cent. per annum, to be kept in repair by said Company (Rec. pp. 107, 704.) The association also purchased some rolling-stock, for the hire of which to the Successor Company they fixed a rate agreed upon by committees of both Companies, of which the following is a specimen: (Rec. p. 494.)

"Executive Committee reported as follows:

"The Ex. Com., who were authorized at a meeting of your Board, held on 21st April, 1860, to hire rolling-stock, to hire or lease buildings for depots, machine shops, engine and car houses and land, for the use of the Company, beg leave to report that they have hired one locomotive and tender, ten box cars, and twenty platform cars, for seventeen thousand four hundred dollars per annum, the hire payable monthly, and the Company to keep the cars and machinery in order at their expense. They further report that they have leased four blocks of ground at the terminus of the road, viz.: Blocks Nos. 513, 514, 573, 574, and the buildings thereon, or now being erected, at a rent of eight thousand dollars per annum, the rent to be paid at the end of each month.

(Signed) "J. J. HENDLY,
"JOHN SEALY,
"JAMES SORLEY,
"*Ex. Com.*"

(Rec. p. 495.)

"The Executive Com., who were authorized at a meeting of your Board, held on the 21st April, 1860, to hire rolling stock, &c., for the use of this Company, report that they have further hired one locomotive and tender and two passenger cars, for the use of the road, for the sum of seven thousand dollars per annum, the hire payable monthly, the Company keeping the engine and cars in order at their expense.

(Signed) "J. J. HENDLEY, *Chairman.*
"L. M. HITCHCOCK, *Sec'y.*"

It will thus be seen that $24,400 per annum, was agreed to be paid for the hire of two locomotives, ten box cars and twenty platform cars, which cost, in all, $47,900, of which a part was not paid to manufacturers for six years afterward, thus making a hire or rent equivalent to fifty per cent. per annum, the repairs to be made by the borrower.

(Rec. pp. 285, 6.)

The testimony of Mitchell (Rec. p. 1,031), and of Dunlap, (page 1,036), shows that 15 per cent. per annum is a fair equivalent for the use of rolling stock in railroads—the lessee keeping it in repair.

These first operations were continued with equal unanimity until, at the commencement of this cause, the Successor Company was claimed to be indebted to said Association in the sum of $33,490.97, and to the Junction Company in the sum of $195,412.29, and that, after having paid out to these private associations who managed it, all its earnings (Rec. pp. 97, 92.)

The Real and Personal Estate Association, in May, 1865, transferred to the Junction Company, all its rolling stock, tools and machinery for about $90,000, and also advanced to said Junction Company, about $100,000 more, which was used in purchasing more rolling stock, &c., all to be hired to the Successor Company, at from thirty to fifty per cent. per annum. (Rec , p. 91.) Thus the Junction Company was, in this respect, the mere successor of the Association for the purpose of absorbing all the earnings of the Railroad. From that time, the Association has only represented the station grounds and buildings at Galveston, claiming them as their property.

3*d*.—Galveston and Houston Junction Company, Defendants.

This Company purports to have been incorporated in 1861, by the then so-called Confederate State Legislature of Texas, after its pretended secession from the United States, and for the purpose of building a railroad through the city of Hous-

ton, to connect the Galveston, Houston and Henderson Railroad with the Texas Central Railroad, a distance of less than two miles. Its original stock was not to exceed $150,000, and if a connection was made between the Galveston, Houston and Henderson and the Texas Central Railroad by July, 1861, that is to say, under the Galveston, Houston and Henderson Charter, the charter for the Junction Company was to cease. (Rec. 93, 94 )

By the Act of February 25, 1863, of the so-called Confederate State Legislature, the former Act was revived ; the capital stock increased to $500,000, and the Company was authorized to purchase and hire out rolling stock to other roads ; but it was also provided in the the third section as follows, (Rec., p. 95) :

"SEC. 3. Said Company shall complete said Road and make said connections between the Galveston, Houston and Henderson and Texas Central Railroad, of the same gauge as those roads, on or before the 1st day of January, A. D. 1864, unless prevented by the *public enemy*, in which event they shall complete the same within six months after the close of the war between the Confederate States and the United States."

Under these acts a company was formed under the name of the Galveston and Houston Junction Railroad Company, but composed of the same persons who were stockholders in the Successor Company. All the capital at any time put into the Junction Company by its stockholders, independent of what they derived from the working of the Galveston, Houston and Henderson Railroad, was $2,974, (Rec. p. 283). With this sum representing a capital of half a million, it constructed, under and with the aid of Confederate military authority, a connecting branch of the Galveston, Houston and Henderson Railroad, crossing Buffalo Bayou, a navigable stream, by a short wooden bridge, and joining the Texas Central at the terminus of that Road. This road was completed after the time limited by the act of 1863 ; and from the time of its completion up to the commencement of this suit, the whole line of the Galveston, Houston and Henderson Railroad has been operated

by this Junction Company, claiming less than two miles of connecting road, with a cash capital of $2,974, and indebted more than $240,000, (Rec. p. 91.) And so far have the other two associations been identified with this, that a sale of a share of stock in the Junction Company carries with it the sale of a corresponding share in the Real and Personal Estate Association, and the Successor Company; so that all the tranfers of shares of all three companies are effected by a single transfer on the books of the Junction Company.

The special claim of the Real and Personal Estate Association, and the individual defendants against the complainants and the bondholders is, that they are not liable to render any account of what they may have received from the earnings of the Galveston, Houston and Henderson Railroad, and that the station grounds and buildings are not subject to the lien of the mortgages, but that, on the contrary, the Receiver should be ordered to pay them the full amount of the rent claimed therefor.

The claim of the Junction Company is, that the Railroad track connecting the Galveston Road with the Central is not subject to the lien of the mortgages, and that the rolling stock, tools and machinery claimed by it, are also free from that liability, and that the Receiver should pay the hire for the period they have been in his charge.

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On the other hand, the complainants expect to show that the individual defendants, in their several characters, as members of these partnerships, are liable to account to the bondholders for the amounts received from the trust property in their hands from 1860 to 1867, and to subject to the lien of the mortgages all the property attached to the Railroad, or used in connection with it, by parties in possession with a knowledge of their equities.

This statement of the case has been made as succinct as possible with a view of presenting to the court the general outline of the case before proceeding to the questions of law, and the analysis of the particular evidence upon which they arise.

## Points and Evidence relating to them.

I. There is, in fact, no controversy in this cause, except as to what currency and principle shall be adopted in the account to be had. The Successor Company in its answer states the following as its admission and offer, which was accepted as herein below shown. (Page 34).

"And this defendant now, again, repeats its entire willingness, and that of those interested in said roads, to surrender said road and all the property which is held in connection therewith, upon receiving reimbursement for actual cash advances and such equitable compensation as is just and reasonable, and this it proposes with full confidence in its legal and equitable defences hereinbefore fully set forth." (Record, p. 80.)

And this is only purporting to carry out what has constantly been professed by all the defendant companies; thus, in the deposition of Sorley (Rec., p. 614), we are told:

"Up to the time my connection with said companies ceased, by the sale of my interest, in March, 1866, it was always my expectation, and, so far as I know, that of all the members of the companies, to make a fair and equitable settlement with the bondholders, whenever they were in a position to negotiate. We had heard that there were several classes of bonds held, some of which claimed priority over others; we expected the bondholders to adjust their several rights, either through the Courts or otherwise. When so adjusted, and we knew the proper parties with whom to treat, we expected either to turn the road ever to them, or to consolidate our respective interests in new stock, making a fair exhibit of our outlay and receipts, to be adjusted amicably and justly by arbitration or otherwise. What change of policy, if any, occurred *after March*, 1866, and the reasons for said change, I have not been informed."

And in the deposition of Hendley we are told :

"My reasons for buying into the new G., H. & H. R. R., Co., are fully made known in my answer to the 15th direct interrogatory ; I had no idea of resisting any honest claim that might be brought against the road. I was ready to sell my stock in the roads and association at any time, and to any person who would carry out the objects for which I bought in, and I so expressed myself to E. C. Nichols, Esq., who, I think, was here to represent some of the bondholders in 1861. As long as I assisted in the management of the road, I know no transaction that was not honest in character. I sold my stock in 1866 to J. W. Jockush. (Record, 591-592.)

These witnesses had sold out their interest in the defendant companies. The deposition of Wm. R. Smith is literally the same as that of all the defendants who are now resisting, and in the 11th cross-interrogatory to him, he states their common views :

"I do not know that there ever was any concerted plan of action in regard to the payment or resistence of the bondholders' claims against the old company on the part of either company or association, or determination respecting the same. It was understood that the bondholders disagreed among themselves. Some of the rumors were that bonds had been issued, and were held by other parties, fraudulently; that some had been reissued after once being retired, and there was to be litigation among themselves, and we did not wish to participate in such a contest. They never intended to hurt or wrong any person, nor to take or receive any income or profits not belonging of right to them. The old G., H. & H. R. R. Co. was, in fact, a failure. The members of the new organization, Galveston citizens, felt it their duty to the public to open the line of travel for commercial purposes, and did so. They expected to receive the earnings of their own investments, and did not intend to resist any honest claim, so far as I know or believe."

On the 18th of January, 1861, the following letter was addressed by Algernon Jones to the Successor Company:

GALVESTON, 18 *Jan'y*, 1861.

"To the President, Directors, and Stockholders:

GENTLEMEN: As representative of a large number of bondholders upon the Galveston, Houston and Henderson Railroad, I beg, for the purpose of avoiding litigation, to submit to you the following propositions, and request an answer to the same at your earliest convenience.

Will you surrender to my clients all the rights which you assume to possess to the franchise and properties of this road, upon their paying to you all the money paid by you to the creditors of the road, and assuming, and in due time satisfying your further liabilities to them, and also purchasing from you at the price you have paid for the same, with a reasonable deduction for wear, all such other property as you individually own in the fixtures or rolling-stock of the road, and interest upon the amount you have expended? This offer is subject to confirmation by my clients within three months after my return to Paris, and to be carried out within six months after the same time. Of course, a balance will have to be struck between your receipts and outlays.

I remain, gentlemen, your most ob't,

ALGERNON JONES.

The reply addressed by the Secretary of the Company to Mr. Jones having been made a part of the Record (p. 1062) is as follows:

January 26th, 1861.

A. JONES, Esq.:

Dear Sir,—By direction of this Company, I enclose herewith a copy of Resolutions passed at a meeting of the Directory, held January 25th, 1861.

Also approximate statement called for.

Very Respectfully,

Your obdt. servant,

(Signed.) L. M. HITCHCOCK,

Sec'ry G., H. and H. R. R.

Approximate Statement of amounts expended.

| | | |
|---|---|---|
| Amount borrowed by the Company and put in the road bed and other repairs | | $40,000 00 |
| Amount due for hire of Rolling Stock, Depots, and Machine Shop | | 25,000 00 |
| Amount of cost of Rolling Stock, Depots, and Depot Grounds, &c., hired by the Company | | 150,000 00 |
| Amount paid judgment creditors on account | | 18,000 00 |
| Total | | $233,000 00 |
| Amount due the City of Galveston, Bridge | $30,000 00 | |
| Amount of Judgment Debt, Local Mortgages, &c | 228,500 00 | |
| | | $248,500 00 |
| Total | | $481,500 00 |

Secry's Office G., H. & H. R. R.,
L. M. Hitchcock,
Secretary.

Copy of Resolutions adopted unanimously by the Directory of the G., H. & H. R. R., January 25th, 1861.

*Resolved*, That it is the opinion of this Board, that if a proposition were submitted within a reasonable time by Mr. A. Jones, or any other parties, to buy out for cash the entire interest of this Company in the Franchise, Road Bed, Rolling Stock, and other property of the G., H. & H. R R., such proposition would be favorably received by this Company.

*Resolved*, That the Secretary be instructed to furnish A. Jones, Esq, a copy of the foregoing Resolutions, also an approximate statement of the amount required to make the foregoing purchase.

(A true copy from the Minutes.)
L. M. Hitchcock,
Secr'y G., H. & H. R R

Galveston, January, 1861.

E. B. Nichols, one of the defendants, in his answer to the 4th cross-interrogatory, states:

"I recollect the visit of Mr. Jones, and I had conversation with him, the precise character of which I do not remember,

but it was a similar character to the action of the Company. The parties interested were willing to relinquish to Mr. Jones, as agent of the bondholders, all claims to the Galveston, Houston & Henderson Railroad and all other property which they had acquired in its connection, including that of the Real and Personal Estate Association, upon repayment to them of their advances and twenty-five thousand dollars for the hire and rent of rolling stock (for interest in same), and the payment of the liabilities they had assumed; and a vote to this purport was adopted and communicated to Mr. Jones, and he left with the assurance that it would be carried into effect; but nothing further was heard from him."

The intention of the defendants to surrender the property, which they felt they had wrongfully acquired, is also shown by all the depositions. (Deposition of Sorley, p. 614; Nichols, p. 618; Brown, p. 628; Hitchcock, p. 633; Hutchings, p. 641; Sealy, p. 651; Hendley, p. 591; and Smith, p. 598; all in the answers to the eleventh cross-interrogatory.) These answers all show, but with a varying color, according to the present interests of the defendants, that it was not the professed, or as we are bound to believe, the real intention of the defendants to interfere with any legal or equitable rights acquired by the bondholders; but that they were willing at all times, as they are now, to relinquish their temporary tenancy of the property upon receiving the fair balance due to them for their outlay.

And, therefore the only question before the Court is, what is the proper allowance to be made to the defendants? This is, manifestly, a matter of account, and must be determined by a careful examination of the evidence, which we shall hereafter undertake.

But the Court will observe that the offer of the defendants "to surrender said road and all the property that is held in connection therewith," (Rec., p. 80), is not alternative—that is to say, in case the Court should find the mortgages to bind the property—but is made irrespective of all the defences and counter-claims of the defendants, and the question now is, whether this Court will go any farther in the examination of the equities of the parties, when it appears upon record that the offer of the defendants, made in their answer above stated, was accepted of record on the 22d of May, 1868, by the com-

plainants, and was taken into consideration by the Circuit Court at the hearing.

The acceptance of the offer is here given (Rec., pp. 248, 249).

"This day came the complainants by their counsel and presented the following paper:

"The complainants referring to that passage in the answer of the Galveston, Houston and Henderson Railroad Company, so-called the successor or new company, which is stated as follows, viz: 'And the defendant now again repeats its entire willingness, and that of those interested in said roads, to surrender said road, and all the property which is held in connection therewith, on receiving reimbursement for actual cash advances, and such equitable compensation as is just and reasonable.'

"And also referring to the answer of the other defendants adopting the answer of the said so-called company, including said passage, now hereby in open court accept said proposal, and submits to the court in the usual course of procedure, to determine what amount, if any, is due to said defendants for actual cash advances, and also, what is such equitable compensation, and to enter a decree accordingly."

"Whereupon it is ordered that said paper be filed among the papers of said cause, and that the consideration thereof is continued to the final hearing."

Parties are generally concluded by their pleadings, and when a deliberate offer or tender is made it cannot be presumed by the Court to be a mere pretence, but is always held as binding and conclusive.

It may be said that, while this offer is binding upon the Successor Company who makes it, it is not necessarily binding as to the Junction Road, or the Real or Personal Estate Association and the property claimed by them.

In reply, we refer the Court to the following clause in the answer of the individual defendants representing all of these so-called companies. (Rec. pp. 98 and 79.)

"And these defendants say that they know the contents of the answers respectively made in this suit by the said companies; that the matters and things in said answers contained, as therein stated, are true; and they pray to be allowed to adopt said answers in this behalf, jointly and severally, and refer to the same with the same effect and benefit as if they were here again restated in words and figures."

And we also refer to the answer of E. B. Nichols (Rec. p.

616,) before cited, and to the letter of Hitchcock, addressed to Jones, stating what the property was. (Brief, pp. 31, 32.) (This letter is not in the printed record, having been mislaid at the time when the transcript was made out, but, it since has been filed in this Court, and becomes a part of the record by agreement of the parties,) (Rec. p. 1062).

We submit, therefore, that this Court should affirm the decree so far as the main road is concerned, and should reverse it as to the remainder, and make the property claimed by the Junction Company and the Real and Personal Estate Association, subject to the lien of the mortgages, and direct it to be sold to satisfy them, upon condition that those companies receive out of the proceeds of sale, the fair balance if any, due them, on their outlays and receipts, without however, *allowing interest*. We are prepared to show that this balance will not be in their favor, but against them.

## II.—Organization and Action of Original Company, the Mortgagors.

It is asserted by the defendants that the original Galveston, Houston and Henderson Railroad Company, organized in 1853, and acting through a body of directors resident, and holding their meetings occasionally, at New York, had no power so to organize and act outside of the State of Texas. This prohibition of extra territorial action is sought to be derived from certain decisions of this Court as to the status of foreign corporations as citizens of other States in which they seek to do business.

1. It is apparent at once that the quality of citizenship is not co-equal with the power of action; as a citizen or an alien may do acts, in themselves legal and valid, in any State; and the question, therefore, reduces itself to this: can a foreign corporation have a meeting of the directors in any state other than that which creates it?

There is no evidence in this case, or is it believed to be a fact, that the corporation, that is the stockholders, ever held a meeting outside of the State of Texas.

The Directors, the agents of the company, did hold some of their meetings, at which one or more of their mortgages were made, in the City of New York.

This they might rightfully do.

It has been frequently decided that, while the corporation cannot abandon the State of its origin and become permanently domiciled elsewhere, it may maintain an office and agents abroad, and make contracts and incur liabilities anywhere, even to the extent of being sued and bringing suit.

Bank of Augusta v. Earle, 13 Pet, 521.
Bard v. Poole, 2 Kern, 495.
McCall v. Byram, 6 Conn. R., 428.
Ames v. Conant, 36 Vermt., 744.
O. & Miss. R. R. v. McPherson, 35 Missouri R., 13
Wright v. Purdy, 11 Ind., 404.
Cary v. Cleveland and Toledo R. R. Co., 29 Barb., 50.
McCluer v. M. & L. R. R. C., 13 Gray, 128.
Kenebeck Co. v. Augusta, &c., 6 Gray, 208.
New York Floating Derrick Company v. N. Jersey Oil Co., 3 Duer, 648.
Angell & Ames on Corporations, §§ 104, 274 and 275.

2. And as its directors are mere *agents*, they may hold meetings and act in other States so as to bind the Company.

Cases cited supra.

Any other view would overthrow all the correspondencies and agencies of foreign Insurance and Mining companies, and invalidate all their agreements. Commerce having adapted itself to this conclusion, Courts will respect rights originating under it.

3. It is to be observed that the original charter of the Company (Rec., p. 81) did not require the meeting of the Board of Directors to be held in Texas, and the regulation that the election of the Board was to be held at Galveston (Sec. 5) does not import that the board were to hold their meetings there. On the

contrary, the Act of January 10th, 1854 (Rec., p. 85), and still more the Acts of January 23, 1856 (Rec., p. 86), and November 20, 1857 (Rec. p. 468), all imply very clearly a knowledge on the part of the Legislature, that the principal office, and the meetings of the Directors had been previously held out of the State, and that this practice was excusable and legal until the more stringent requirements were made; and even at present, there is nothing to compel the meetings of the Directors to be held in Texas.

4. The conclusive answer to this position of the defendants is, that they cannot set it up. They claim as assignees of the judgment creditors of the Company, and under an execution sale of the Company's franchise and property. Unless the Company was organized in fact and law, and was a person capable of receiving and contracting, it would have no franchises or property, and could incur no debts. The due organization must, therefore, be admitted on both sides, as well as the legality of the action of the Board of Directors in New York, in employing agents and workmen in Texas, and there fore necessarily of making generally contracts for construction, including the negotiation of loans.

III. The Execution of the Deeds of Trust or Mortgages.

The first deed of trust for the 6 per cent. bonds was made to William Kent, Ambrose Moore and John Masterman, the two latter of London. Kent accepted it, but died before the filing of the bill; Moore and Masterman refused to accept. (Rec., pp. 291, 292.)

The second deed of trust for the ten per cent. bonds was made to William Kent and Charles B. Haddock as trustees, both since dead. Haddock signed the deed and bonds, and Kent signed a counterpart and accepted *en pais*. (Rec., pp. 344, 354, 291–2, 471.)

The third deed of trust for the 8 per cent. bonds was made to the second trustees; neither of them signed the deed. Kent declined to accept (Rec., p. 349, 291–2), but it appears that Haddock, as trustee, countersigned the bonds. (Rec., p. 473.)

1. It is scarcely necessary to refer particularly to the evidence in regard to the execution and acceptance of these deeds of trust; because it sufficiently appears that the defendants have constantly treated them as existing obligations of the Company; for in their offer of settlement, to which we have before referred, they object not to the execution of the deeds themselves, but to particular bonds, alleged to be either spurious or improperly issued, thereby admitting that other bonds of such issue were properly issued and secured by the deeds of trust.

And, indeed it is not the duty of the holders of bonds, negotiable in their character, and put afloat by the officers of a railroad company, to look into the regularity of every preliminary step; they are entitled to assume that everything has been done which the law or charter of the Company requires.

Zabriskie *v.* Clev., Col. and Cin. R. R. Co., 23 How., 381.

Bissel *v.* M. S. & N. Ind. R. R. Co., 22 N. Y., 258.

Allegany *v.* McClurckham *et als*, 14 Penn., 83.

Argenti *v.* City of San Francisco, 16 Cal., 255, 273.

## IV.—Authority to Mortgage Property and Franchises.

By the Charter of the Company, it is invested with the capacity, "in the corporate name to make contracts, to sue and to be sued, to grant and receive, and generally to do and perform all such acts as may be necessary and proper for or incident to the fulfilment of its obligations for the maintenance of its rights under this act." (Rec., p. 81.)

And "all conveyances and contracts executed in writing, signed by the president and countersigned by the treasurer or any other officer duly authorized by the directors under seal of the company, shall be valid and binding." (Rec., p. 82.)

And after providing for the expropriation of the land necessary for the purpose of locating, constructing and maintaining its railway, the 9th section of the Charter authorizes the Company to "purchase or receive by donation such real estate as the directors shall think desirable for the purpose of aiding in

the construction or maintenance of said road," and authorizes the company "to alienate or mortgage such real estate." (Rec., p. 83.)

And the 10th section empowers the company "to borrow money on their bonds or notes at such rates as the directors deem expedient." (Rec., p. 88.)

1. It is to be observed that after the road had been notoriously constructed by the proceeds of the sale of the bonds; and this fact had been brought to the knowledge of the Legislature (as is shown by the depositions of D'Alton Shee and Briggs, Rec., p. 716) the Act of November 20th, 1857, was passed, containing the significant clause at the end of the third section, "that said company shall hereafter be liable and bound in all respects for all debts incurred and contracts hereafter made by it, in the same manner and with the same effect as it was previous to the 1st day of November, 1857." (Rec., p. 469.)

2. The general rule as to the exercise of powers not directly conferred by its charter upon a corporation, is that all powers are considered as granted, which may be necessary to the attainment of the object of the company.

Bank of Columbia, *v.* Patterson, 7 Cranch, 299.
Mott *v.* Hicks, 1 Cow., 513.
Berry *v.* Merchants' Exch. Co., 1 Sandf., Ch., 280.
Richards *v.* Railroad, 44 N. H., 135.

In this case the 2d section of the Act of 1853, (Rec., p. 81,) defines as the object of the incorporation the locating, constructing, owning and maintaining a "Railway, commencing at the City of Galveston, crossing Galveston Bay so as not to obstruct or unreasonably impede the navigation of the same, and thence running by such course and such point at the City of Houston as said Company shall deem most suitable; and thence running by the most suitable and direct line to Henderson, in Rusk County." Without any further grant of power, the company would undoubtedly have authority to take all the steps necessary to accomplish this object and not prohibited by the Charter or made impossible by the constitution of the company itself the rule being that restrictions upon the power of a com-

pany preventing it from doing an act within its corporate *capacity* must be imposed by the act creating it.

And this is the case in particular as to the power to mortgage the road bed or other property of a corporation, and also its franchises.

Jackson *v.* Brown, 5 Wend., 590.
Berry *v.* Merch't Ex. Co., 1 Sandf. Ch., 280.
Fay *v.* Noble, 12 Cushing, 1.
Jessup *v.* Bridge, 11 Iowa, 572.
Susquehanna Bridge Co. *v.* Ins. Co., 3 Md., 311.
Davis *v.* Bank of U. S., 5 W. & S., 223.
White Water Canal, &c. *v.* Vallette, 21 How. 414.
Gue *v.* Tide Water Canal Co., 24 How., 257.
James *v.* Minnesota R. R. Co., 6 Wal., 750.
Phil & Sunb. R. R. *v.* Lewis, 33 Penn R., 33.

It is particularly to be observed that by the fifth section of the Act of 1857, (Paschal Dig., p. 8 0), the right of a railroad corporation in Texas, to impose a lien upon its franchises, was distinctly recognized; and that thereby the liens previously granted were confirmed by legislative authority. And it will be seen by reference to the recital in the third mortgage, (Rec. p. 349,) and the second mortgage, (Rec. p. 344,) that each subsequent mortgage recognizes the preceding, and that there is no conflict whatever between them; so that if the eight per cent. mortgage be valid, which is hardly denied by the defendants, the prior ones must be equally good. 25 Barb., 284.

3. The cases cited upon the other side, from the English Reports, which appear to support a stricter rule, are decisions at Common Law, or decisions based upon the application of some of the stockholders seeking to prevent injurious action by the company.

But it is perfectly established in Chancery, that the Courts administering the equities of the parties, will compel the company and those claiming under it, to respect the engagements

into which it may have entered toward third persons, when they cannot be adequately reinstated in their former position; and the company will not be permitted to set up irregularities or even want of power as a justification for their refusal to comply with these promises in good faith.

Eastern Counties Ry. Co. *v.* Hawkes, 5 Clark's House of Lords, 331, 370, 375.
Fay *v.* Noble, 12 Cushing, 1.
Cary *v.* Cleveland & Toledo R. R., 29 Barb., 35, 52.
Northern Central R. R. Co. *v.* Bastain, 15 Md., 494.
Warner *v.* Chappel, 32 Barb., 300.
Aken *v.* Blanchard, " " 527.
Bissell *v.* M. S. & N. I. R. R. Co., 22 N. Y., 258.
Parish *v.* Wheeler, 22 N. Y., 506.
Wilson *v.* West Hartlepool Co, 34 Beav. 187

4. Railroad bonds have assumed the character of negotiable paper, and that character has been sanctioned by the decision of this Court.

Commissioners of Knox County *v.* Aspinwall, 21 How., 539.
Moran *v.* Commissioners of Miami County, 2 Black, 722.
Mercer County *v.* Hackett, 1 Wal., 83.
Bissell *v.* City of Jeffersonville, 24 How., 287.
Meyer *v.* City of Muscatine, 1 Wal., 385.
White *v.* Verm. & Mass, R. R. Co., 21 How., 573.
Gelpecke *v.* Dubuye, 1 Wal., 176.
Murray *v.* Lardner, 2 Wal., 110.
Bronson *v.* La Crosse R. R., 2 Wal., 283.
Thompson *v.* Lee County, 3 Wal., 327.

One of the properties of negotiable paper is, that it carries with it to every holder the assurance that it is free from all secret objections not disclosed by its face. To assume that the company which issues paper of this class, can require the

holder, before investing in it, to examine the several acts relating to the company, obtain legal opinions as to their construction, and foresee all doubtful questions, is, at once, to destroy the negotiability of all corporate securities.

All that the public need to know is, that a company has been invested with the power to construct a railroad, and that it necessarily has the right to do everything conducive to that object. (Case cited above.)

Le Conteulx *v.* Buffalo, 33 New York, 333.
Leazure *v.* Hillegus, 7 S. & R., 320.
Bank of Kentucky *v.* Schulkill Bank, 1 Parsonts Penn. Select Cases, 235.
Dana *v.* Bank of U. S., 5 W. & S., 243.

5. Even if a question could be raised as to the power to mortgage, the defendants are not entitled to make it. They are purchasers of the franchises and property of the company by virtue of an execution sale, and have simply such title as was avowedly held by the company at the time of such sale. But they could not acquire by such sale the latent or possible equities of the company not previously asserted by it; in other words, they take the property as the company recognized it to exist, and a part of their argument is, that they do not succeed to the company, but by virtue of the Act of 1857, gain a new and separate corporate existence without any privity with the original organization. They are, therefore, concluded by the acquiescence and constant recognition of the company as to the obligations resting upon it, and cannot now do what the company did not see proper to do.

Gordon *v.* Preston, 1 Watts' Penn., 387.
Lane *v.* Bodman, 17 Ohio State R., 647.
Wright *v.* Bundy, 11 Ind., 343.

Dolphin v. Aylward, Law Repts. in 1870, Appeal Cases, vol. 486. 499-507.

At the sale of the road the defendant had the benefit of the mortgages by an abatement of the price or amount bid and paid as the purchase money; hence the defendants were able

to buy 50 miles of railroad costing over $40,000 per mile, at $28,000, or say, $560 per mile, subject to the mortgages. They have no right to complain of the amount of the mortgage debt.

2 Wal. 311. Bronson *v.* La Crosse R. R.

## V.—Issue and Negotiation of Bonds.

1. The 10th section of the Act of 1853, authorizes the issance of bonds, and when issued, according the provisions of the 5th section, they became valid obligations of the company. But the 5th section did not require the bonds to be signed by any one, but the President and Treasurer, and these signatures once affixed imported the authority of these officers to issue the obligations. Even if the taker were bound to examine the provisions of the charter, he would have found nothing inconsistent with the entire regularity of the issue, and he is clearly not required to examine the record book of the company to ascertain what resolutions were passed, when the company held out to the world, that its officers were sufficiently authorized, and when they thus ratified their acts and received the proceeds of the sale of bonds.

(Cases before cited.)

2. Nor is the holder of railroad bonds bound to see to the application of the money for which they were originally negotiated, and to watch over the faithfulness of the directors to their duties. The contrary doctrine would lead not only to the destruction of all confidence in railway securities, but would expose the company to vexatious interferences and examinations on the part of any bondholder, and would, in effect, be converting the bondholders into stockholders, without imposing upon them corresponding duties,

Philadelphia and Sunbury R. R.Co. *v.* Lewis, 33 Pa., 38.

## VI.—The Form of the Suit and Parties.

1. The deeds of trust authorize the trustees to sell the property after default; but while the remedy exists it does not exclude the right to invoke the action of a Court of Chancery. On the contrary, a bill for the foreclosure and sale of the mortgaged property is justified by considerations of convenience to the parties, and is within the usual course of practice. The necessity of providing against the equity of redemption; of regulating and adjusting the claims of all parties—of securing a fair, impartial and adequate sale—of bringing in the numerous persons concerned in a general adjustment—of closing finally the administration of the trusts—of ascertaining the priorities and marshalling the assets—makes it indispensable to have recourse to the general jurisdiction of a Court of Chancery as the proper means of closing the litigation.

2. The trustees are not *necessary parties.* They are the holders of the legal title conferred on them, simply to enable them to act as the agents of the Company and the bondholders.

They have no interest to be protected by the decision of a Court, except their possible commissions.

As the Court is called on to dispose of the equitable title, it can act upon that title directly.

A Court of Equity will not allow a trust to fail for want of a trustee; and it appears in this case, and is not disputed, that all the trustees, who accepted the trust, had died before the filing of the bill, so that the complainants have a right to call upon this Court to assume the administration of the trust.

Adams Eq., 174, Note.

3. It is unnecessary to make all the bondholders parties to this proceeding, even if it were possible; for the Rule in Equity provides expressly; (Rule 48,) That "Where the parties on "either side are very numerous, and cannot, without manifest "inconvenience and oppressive delays in the suit, be all "brought before it, the Court in its discretion may dispense "with making all of them parties, and may proceed in the suit, "having sufficient parties before it to represent all the adverse

"interests of the plaintiffs and the defendants in the suit prop-
"erly before it. But in such cases the decree shall be without
"prejudice to the rights and claims of all the absent parties."

4. Nor is it necessary to make all the persons claiming in connection with the defendants, parties to the suit, so long as their interest is represented by the actual defendants. The 51st rule in equity sufficiently indicates the correctness of this practice.

When a committee or trustees of a body of stockholders are parties, it is sufficient; all the stockholders are not necessary parties.

7 Wal., 415, Howard v. R. R. Co.

5. It is not necessary to make the City of Galveston, or the Houston, Trinity & Tyler R. R. Company parties; because no relief is prayed against them; and the decree especially provides that their rights shall not be affected. The interest of the City of Galveston has been since the filing of the bill voluntarily alienated to some of the complainants, (Rec. p. 202,) and the only claim of the Houston, Trinity & Tyler Railroad Company is for the payment of a debt contracted by the Galveston and Houston Junction Railway Co., in the construction of the Houston connection; which is, of course, a lien upon the property in any event, subject to which the complainants will take.

6. The subpœna directed to the original Company was served on Wm. R. Smith, as the last President of that corporation. In his answer, he admits that fact, but pleads that he ceased to be President by the effect of the execution sale, from the 5th day of March, 1860. (Rec. p. 136.)

If it be true, that the effect of the sale was to dissolve the Company, and remove the President from office, it would be unnecessary to have any service made upon the Company, and

a Court would proceed to adminster the trust property without such service.

Mumma v. Potomac Co., 8 Pet. 286.
Ogilvie v. Knox Ins. Co. 22 How,, 380, 387.
Wood et. al. v. Dummer et al., 3 Mason, 316.
Curson v. African Co. 1 Vern., 121.
S. C., Skinner, 84.

But, it is a general rule, that an officer of the Company, cannot, by electing to retire, prevent the service of a process in a suit by a creditor of the Company.

Evans v. Killingworth, 20 Conn., 447

7. Nor can it be said, that the proper parties to be sued, are the Board of Directors, acting as Trustees of the sold-out Company because, acccording to the defendant's own case those trustees do not represent the railroad itself; and the service upon them, would not therefore be good as to the main portion of the property. The question, as to whether the Company is bound by service upon Smith, should have been presented by the Company itself, or by some person interested in that question, and should have been made by a motion to quash the Marshal's return, in which Smith is described as president of the Original Company. (Rec., p. 24.) The whole matter was submitted to the Court below, which overruled the plea of Smith (Rec., p. 26,) and allowed a decree *pro confesso* against the Company, (Rec., p. 160,) which was made final by the decree, *and from which no appeal has been taken.*

## VII.

It is apparent from what has been said, that the defendants cannot seriously oppose the claim of the complainants, so far as the Road from Galveston to Houston with the original rolling stock is concerned; nor do they, in fact, base their defence upon such a pretension. They claim, substantially, that the other property purchased by them since they came into possession of the Road, either with the earnings of the Road

itself, or with their own money, is not subject to any lien or any other accountability to the Bondholders; and further, that they are entitled to a payment out of the funds to be realized by the sale of the original property, for the hire of this additional property, while in the possession of the Receiver.

Before proceeding to examine these questions, which are the only vital points of this cause, it is proper to define with greater certainty the position of the defendants.

NOTICE OF MORTGAGE.

1. There can be no doubt that the defendants had not only constructive, but actual notice of the existence of the several Deeds of Trust and the issuance of the corresponding Bonds. In the *first* place, the Deeds of Trus twere duly recorded, (Rec., p. 333); and by the Registration Laws of Texas, this constituted constructive or legal notice, and as a railroad in Texas is legally treated as an entirety, a record in the county where the principal office is kept is good to the whole world. Wheelock testifies that the Sheriff at the time of the sale stated the different mortgages and their amount. (Rec., p. 363).

2. There is also proof that the existence of these Deeds of Trust and Bonds was a matter of notoriety in the community; and besides this, the defendants neither in their answers or evidence, deny their knowledge as to such facts as would necessarily put them upon inquiry. And the offer made by Algernon Jones, in 1861, on the part of the bondholders, and before the defendants had gone too far to prevent their retracing their steps, must have reminded them again of the existence of the bonds and mortgages.

3. Another unanswerable proof of the knowledge of the defendants, is found in the fact, that the principal organizers of

the successor Company were Directors in the original Company. These Directors were as follows:

| | |
|---|---|
| Wm R. Smith, | George Ball, |
| Jacob L. Briggs, | Julius Kauffman, |
| Nabor B. Yard, | Jacob C. Kuhn, |
| Alfred F. James, | Thomas M. League, |
| Ebenezer B. Nichols, | Thompson H. McMahan, |
| Robert Mills, | John Shackleford. |

(Record, p. 290.)

All these persons, except League and Shackleford, were members of the new association, and are now, with the exception of Kauffman, Kuhn, League and Shackleford, defendants in this cause. They, therefore, introduced into the new association the knowledge with which they are charged as Directors of the original Company.

4. If it be said that the evidence as to the knowledge of the original purchaser at the execution sale, B. F. Terry, and of the judgment creditors is not so clear, and that they claim to be purchasers without notice, and so protect the defendants, who succeeded to their purchase, the reply is two-fold:

*First:* That they are not entitled to protection as purchasers, because no money or other valuable consideration was paid at the sale (Record, pp. 295–557); and—

*Second:* Because in an agreement signed by the judgment creditors, before the sale, for a stay of execution, it is provided that the stay shall not continue "if the bondholders shall take "possession of, or attempt to sell said road or property of said "Company." (Record, p. 466.)

## VIII.—The Defendants as Constructive Trustees.

1. The general principle that those in possession of trust property, with the knowledge of the trust, who acquire it by means not recognized in the trust deed, become thereby constructive Trustees, is too well settled to require much discussion.

Cases before cited, and

Michoud *et als. v.* Girod *et als.*, 4 How., 503.
2 Spenc. Eq. Jur., 298–300.
Van Epps *v.* Van Epps, 9 Paige, 238.
Howard *v.* R. R. Co., 7 Wal., 409.
16 Vesey, 249.
2d Swift's Digest, 114, side page.

If a purchaser has notice of the trust deed at the time of purchase, he becomes a trustee.

2d Swift's Digest, 115, side page.

Some differences are recognized between a constructive trustee and a voluntary one; but these differences apply alone to cases of *laches* or limitation, and until one of these defences is made out by the lapse of the requisite time, there is no distinction as to responsibility between the two classes of trustees. In fact, the more wrongful the possession, the more reason is there for the enforcement of a strict accountability.

2. Trust property will be followed by a Court of Equity wherever it can be found; and whether the possessor is made chargeable with the trust or not, depends entirely upon his knowledge, without reference to the purity or honesty of his motives. Any other principle would lead to the destruction of trusts, by placing the question of liability upon uncertain evidence as to the *intentions* of the parties interfering with them.

Adair *vs.* Shaw, 1 Sch. & Lef., 203–262; 3 Mason, 316.
Oliver *vs.* Pratt, 3 Howard, 401.

Where trust money can be traced into the purchase of land, the land in general is liable.

10 Vesey, 517.

Every advantage gained by a trustee belongs to the *cestui que trust.*

2 John., Ch. 30, Holridge *vs.* Gillespie.
5 Monroe, 435, Morison *vs.* Coldwell.

3. It is also to be observed, that the directors of the original company were by their office, trustees for that company in the discharge of its duties and obligations to both stockholders and bondholders; and this trust once voluntarily assumed, cannot be resigned at the mere option of one party. It followed them in their new combinations, and impressed its character upon their associates also. The Real and Personal Estate Association and the Junction Company, were created by means of the facilities which had been placed in the power of these directors by the original corporation, and cannot be used as a cover for their treachery. In the language of Judge Davies, in the case of the Cumberland Coal Co. *v.* Sherman, 30 Barb., 553: "They were its creators; they breathed into it life and gave it all it had, and owned the whole of it at its creation * * * and therefore what they knew, their creatures knew." (Page 560,) and see

Phillips *v.* Winslow, 18 B. Monroe, 43, 446, 9.
Lane *et al. v.* Baughman, 17 Ohio State, 642–648.
Abbott *v.* Hard Rubber Co., 33 Barb., 593.
York & Md. Line R. R. Co. *v.* Winans, 17 How., 30, 40.
Canal Bridge *v.* Gordon, 1 Pick., 296–304.

Pulsford v. Richards, 17 Beavan 87. 107
York & Maryland Co v. Hudson 16 " 485; 491

"Equity regards the property of a corporation as held in trust for the payment of the debts of the Corporation and recognizes the rights of the creditors to pursue it," &c., into the hands of all purchasers with notice—an account may be compelled, &c.

Howard *v.* R. R. Co., 7 Wal., 409.

## IX.—Accountability of the Defendants.

Considering the defendants as having acquired by the sale in 1860, only the bare legal title to trust property, to be administered by them like all trustees, it will necessarily follow:

*First:* That they are accountable individually, and in their assumed corporate characters for the income of the property while in their possession, meaning by this the gross income, less such expenses of management as are strictly necessary.

*Second:* That they cannot use their discretion to increase, repair, or improve the trust property, without subjecting their additions or improvements to the obligations of the trust.

*Third:* That they cannot borrow, or themselves advance money for additions or repairs, and charge the trust property with the amounts without giving the option to the *cestui que trust* to claim or refuse those additions; and they cannot in any event claim interest upon outlays, to which the beneficiaries have not assented.

*Fourth:* That by mixing their own moneys with those derived from the trust estate, they are obliged to consent that the Court shall make no distinction between them.

*Fifth:* That by attaching fixtures to the realty, they lose their power of separation and their claim to compensation

These principles need scarcely any support from authority, and the more important decisions sustaining them will be noticed when we refer to those parts of the case to which they are peculiarly applicable.

## X.—Accountability of Mortgagors and Trustees.

1. The reply made to these positions is, that a mortgagor before foreclosure, or before the filing of the bill for that purpose,

is not bound to account to the mortgagee for the income of the property; but this reply, in this instance, is based upon three errors:

*First.*—That the mortgagor is never responsible for the income of the property, whereas he is so responsible when he retains possession forcibly or by fraud, without laches on the part of the mortgagee or permission expressed or implied that the mortgagor should continue in possession.

*Second.*—That in this case the mortgagors do not expressly pledge in the trust deeds all the tolls, income, issues and profits, whenever the mortgagor should be in default, &c., whereas they do so mortgage them. (Rec., pp. 11 and 16.)

*Third.*—That this is a case between mortgagor and mortgagee simply; when it is in fact a case between the *cestui que trust* and the wrongful possessor of trust property.

The first distinction is best sustained by a reference to the earlier authorities.

Mead *v.* Orrery, 3 Atk., 224.
Coleman *v.* Duke of St. Albans, 3 Ves., 25.
Pulteny *v.* Warren, 6 Ves., 90.
Backhouse *v.* Jett, 1 Brock, 500.
Moss *v.* Gallimore, 1 Doug., 279.
Lofsky *v.* Maujer, 3d Sandf. Ch., 69.
Newell *et al v.* Wright, 3 Mass, 152.

But a more satisfactory answer, perhaps, to the views taken by the defendants is that the cases in which the mortgagor is not bound to render account of the income before the foreclosure suit, are those of a simple mortgage covering the property and not specifying particularly the income as being itself actually mortgaged; while in the present case there is a specific mortgage of the tolls, income and profits, whenever "said company shall be in default of making payment." (Rec. pp. 337–342–347.)

The authority to pledge the future earnings of a railroad not yet brought into existence, is recognized in many decisions—among which we may cite:

Jesup *et al.* v. Bridge *et al.*, 11 Iowa, 572.
State *v.* North Central Co., 98 Md., 193.
Parkhurst *et al.* v. Northern Central R. R. Co., 19 Md., 472.
Seymour *v.* Canandaigua and Niagara Falls R. R. Co, 25 Barb., 284-300-310.
Willink *v.* Morris Canal Co., 3 H. W. Green Chancery, 401.
Mitchell *v.* Winslow, *et al.*, 2 Story, 630.

The default in paying the interest occurred not later than 1859, and certainly before the sale in 1860, (Rec. pp. 288, 289,) and this is also acknowledged by the agreement of the judgment creditors to which reference has been made. (Rec. p. 466.) The defendants are therefore bound by the very terms of trust, to account for the income received since the 6th day of March, 1860.

The third ground previously noted (page 50) upon which we claim to hold the defendants responsible, scarcely admits of argument.

It is that a person who comes into possession of trust property wrongfully, and especially by using means which his fiduciary relations have placed in his power, cannot absorb the revenues of that property, and convert them to his own use without accountability. The authorities previously cited illustrate this elementary principle; but we refer in addition also to the case of

Fowler *v.* Merrill, 11 How., 375, 397.

And especially to the case of

Jotkin *v.* South East R. R. Co., 6 De Gex, M. & G., 270.
S. C., 2 Smale & Giff Ch. R., 48.
S. C., 31 Eng. L. & E., 320.

This later case seems to be almost precisely in point and to decide very clearly that a purchaser of mortgaged property is accountable for the hire from the time of his possession, except so far as the mortgagees may expressly waive that right.

And in this case it is very evident that the efforts of the mortgagees to enforce their utmost rights, commenced almost immediately after default, and when interrupted by the war, were resumed as soon as the Courts of the United States were reorganized in Texas. (Rec. pp. 27, 291, 292, 225.)

It is easy to establish the amount of the income of the premises mortgaged by reference to the books of account kept by the defendants themselves. But as those accounts were kept, a portion of the time, in so-called Confederate money, some rule must first be established as to the mode of computing that currency.

On the one hand it would seem proper to charge the defendants with the *par* value of this money as equivalent to so much United States Currency; inasmuch as the defendants received it without the consent of the beneficiaries; on the other hand, it may be contended by the defendants that it should be reduced to its absolute value in gold, up to the time when the United States lawful money currency was established, and subsequently to that time, in lawful money of the United States.

I.

Upon the principle that the defendants should be debited with Confederate money received, and credited with that paid out at par, the account will stand (Rec., p. 825.)

*Dr.*

| | |
|---|---|
| To whole amount received from earnings of Railroad, reckoning gold, confederate money, and lawful money at par, from March 12, 1860 to Feb. 28, 1861..... | $4,622,198 |

*Cr.*

| | | |
|---|---|---|
| By amount paid out: | | |
| Operating expenses | $2,309,496 | |
| Less paid to defendants for hire, (Rec., 820) | 640,504 | |
| | $1,668,992 | |
| Paid to Receiver | 51,607 | |
| Exchange of lawful money for gold.. | 31,585 | |
| | | 1,752,184 |
| Balance due by defendants | | $2,426,415 |

This balance is chiefly made upon defendants books of the following items:

| | |
|---|---|
| Paid judgment creditors | $217,581 |
| Revision and reduction of acct. in 1865 | 875,922 |
| Conf. States Quartermaster vouchers | 794,300 |
| " " Bonds | 10,200 |
| " " Notes | 14,403 |
| Paid to Defendants as hire | 640,504 |

The item of $875,922, claimed as a credit, was a correction made after the close of the war, by the accountant of the Successor Company, under the instruction of the Directors. It was an afterthought or expedient for reduction of the existing balance, which would not have been thought necessary if the issue of the war had been different. (Rec., p. 282.) The item of $794,300 in Confederate Quartermaster vouchers, was not considered by the Successor Company so late as March 27th, 1865, as inferior to its nominal value; for, on that day the Directors appointed a Committee to proceed "to the seat of government in order to collect the large amount due this Company from the Confederate government." (Rec., p. 408.)

As to these amounts, therefore, the defendants stand in the same position as improvident trustees, investing their fund in unprofitable or worthless securities. The accounts as they stood at the end of the war should control.

II.

On the basis of lawful money, except as to the dividends accepted by the defendants at par. The defendants are:

*Dr.*

| | |
|---|---|
| To Cash improperly paid to local judgment creditors in lawful money (Rec., 899)..... | $116,696 |
| " " received in dividends at par (Rec. 286)... | 223,392 |
| | $340,088 |

*Cr.*

| | |
|---|---|
| By Cash advances by defendants (Rec., pp. 282, 286, 298)..... | 168,299 |
| Balance due by defendants..... | $171,789 |

The sum of $223,392 above stated, was voluntarily received by the Real and Personal Estate Association, and distributed among its members at par. Their receipts in full are in evidence (Rec. p. 286.) While the case of Thorington vs. Smith, 8 Wal. 1, allows in favor of the Confederate *creditor* or purchaser, that some value should be given to Confederate money made the basis of contracts, it does not decide that an absolute receipt at par, for indebtedness created during the war, can be scaled afterwards; nor can it be said that the *ipsissima verba* of the defendants were unintentional or extorted; because they were dealing, in this respect, with each other, and need not have declared or accepted any dividend.

If the principles previously stated as to the constructive trustee not being allowed interest, compensation or hire, are correct; the balance against the defendants, cannot in any event be entirely canceled, and the property purchased by them and added to the road, will belong to the trust estate, without further advances by the beneficiaries; so that in case the Court should not consider the proposition of the defendants in their answer, and its acceptance by the complainants (Record, pp. 50

and 248) as a sufficient basis to close this litigation, the strict legal result would be far more unfavorable to the defendants.

## XI.—Original Railroad and Additions—Junction Railroad.

To appreciate the exact position of the defendants, it is necessary to state, with some detail, the condition of the Road in 1860, and the part to which each of the Companies, which the defendants composed, played in their joint operations.

At the time of the sale in March, 1860, the road was completed from Galveston to the intersection of Main and McKinney Streets, in the City of Houston, being about the centre of the town; it had two locomotives, one second class passenger car and fourteen flat cars (Rec. p. 434), but no connection had yet been made with the Texas Central Railroad, the initial point of which was about a mile distant, and on the other side of Buffalo Bayou, a navigable stream, which divides the City of Houston. It was the intention of the original Company to provide additional rolling stock, and to complete the Houston connection along the line of McKinney Street, crossing the Bayou about the head of navigation and connecting with the Central Railroad near its machine shops, as shown on the annexed plan (at the end of the brief), as the line of the Rudd Railroad. Some opposition, excited in the City of Houston to this projected route, prevented the completion of the connection on the line proposed; and it became necessary, in order to harmonize all interests, to construct the connection through the eastern part of the city, crossing the Bayou below the head of navigation and join the Central Railroad at its initial station. As some question was made, although incorrectly, as to the right of constructing any connection under the original charter, as it then stood, the successor company organized a new corporation, composed of the same members, under the name of the Galveston and Houston Junction Railroad Company, and on the 8th April, 1861, after the attempted secession of the State of Texas, and while resisting the authority of the United States, obtained an Act of incorporation, which was afterward modified by an Act of the 25th

February, 1863. The object of these Acts was to enable the successor company to construct the connection, and also to hire rolling stock to other railroad companies, but it was the original intention of the successor company to consider the Junction Railroad as a part of its line, and only to use the new charter for the purpose of protecting itself.

This is shown particularly by the proceedings of the Directors, July 14th, 1860, and of the Stockholders, January 16th, 1861, which are here given.

MEETING OF THE DIRECTORS OF THE G., H. & H. RAILROAD COMPANY, JULY 4TH, 1860. (Rec. p. 496.)

Present: A. F. JAMES, President, in the Chair; Messrs. BROWN, HENDLEY, KAUFFMAN, MILLS, MCMAHAN, NICHOLS and SEALY.

On motion of Mr. Nichols, it was *resolved*, that a Committee of four be appointed to visit Houston immediately, for the purpose of arranging with the Houston and Texas Central, the Houston Tap, and the New Orleans and Texas, and the H., T. & Tyler R. R., for the building of a bridge across Buffalo Bayou, and the use of San Jacinto Street, in common with them, with power to buy depot grounds and the right of way through such private property in the City of Houston as may be desired; and to do and perform such other things as the interest of the Company may require.

Messrs. A. F. James, McMahan, Brown and Mills were appointed members of the Committee.

S. B. DAVIS,
Secretary.

MEETING OF THE STOCKHOLDERS OF THE G., H. & H. RAILROAD COMPANY, JANUARY 15TH, 1861. (Rec. p. 496.)

Moved and adopted, that the Association make an application to the Legislature for a Charter to incorporate a new Company to connect by railroad with the Texas Central, through or around the City of Houston, and that a Committee of three be appointed for the purpose of drawing up such memorial.

Messrs. Sorley and Yard were appointed said Committee.

L. M. HITCHCOCK,
Secretary.

It is unnecessary to say, that property thus acquired by means of a mere device to interpose another corporate name for the benefit of the successor Company, still remains, in substance and fact, the property of that Company. And the fact, that the new Corporation was designed simply to represent the successor Company, and to be used as an instrument for the purposes of that Company, also appears by the 3d Section of the original Charter of 1861 (Rec. p. 93), which provides that the Junction Company is designed to construct a railroad commencing "at or near Houston, *on the line of Galveston, Houston and Henderson Railroad*, and running *through* or *around* the City of Houston, and connecting with the Texas Central Railroad," and also by the 5th Section of said Charter, in which it is provided,

"That in case the connection by Railroad shall be made through the City of Houston between the Texas Central and the Galveston, Houston & Henderson Railroad, of the same gauge as those roads, by the 5th of July, 1861, then all rights under this Charter shall cease and determine."

It is true that the Junction Company, in its answer, asserts, (Rec. p. 91,) that "the successor company had no funds, means, credit or ability to effect such junction, purchase the material or make the said road and improvements necessary thereto; and the said Act of incorporation was procured because a separate and independent company, free from the embarrassments of the said Galveston, Houston and Henderson Railroad was indispensable to procure the funds and credit necessary to build and effect said junction;" but in plain contradiction of this statement, it appears and is acknowledged by the defendants, that $2,974, in gold, was the only means contributed by the members of the Junction Company, for the construction of the road forming the connection, (Rec. p. 283,) and that the remainder was borrowed from the successor company, in change tickets, to the amount of $18,344 70, and from the Houston, Trinity and Tyler Railroad to the amount of $19,231 85 for rails, and $12,000 for rolling stock; the assessment of 29 per cent. upon the stock of the Junction Road, or $43,123, in Confederate money, having been repaid, and received by the stockholders at par, (Rec. pp. 90, 899); and

as the individual members of both companies were the same, nothing would have been easier than for the members of the successor company to have guaranteed the debt incurred to the Houston, Trinity and Tyler Railroad.

It is thus acknowledged that the device of the new Junction Company was simply contrived to avoid the lien of the bonded debt upon the extension of the G., H. & H. Railroad, and this is a tacit admission of that lien.

Abbott *v.* Hard Rubber Co., 33 Barb., 593.
York & Md. Line R. R. Co. *v.* Winans, 17 How., 30 40.
Canal Bridge *v.* Gordon, 1 Pick., 296, 304.

### New Railway Equipment.

With the exception of the small number of engines and cars belonging to the original company, the entire amount of rolling stock, machinery and tools, amounting, at the outside valuation, to $244,669 69, (Rec. p. 129,) at the time this property went into the hands of the Receiver, was bought in the name of the Real and Personal Estate Association and Junction Company, and cost in United States currency, including the cost of the real estate purchased for depots, $269,269 58, (see statements of auditors referred to, Rec. p. 914.)

The only real questions in the case, therefore, are as to the allowance to be made the defendants for hire, interest and compensation.

### XII.—Defendants not Entitled to Charge for Hire.

As to these questions, it is to be noted that the defendants confess in their answers and depositions that the Successor Company, Real and Personal Estate Association and the Galveston and Houston Junction Railroad Company, was composed of the same persons, (Rec. p. 67, 87, 96, 98, 569, 683, 589, 591, 597, 598, 511, 622, 630, 638, 646, 651, 781, 786,) and they also acknowledge that the object of forming these outside companies was to operate the Galveston, Houston and Henderson Railroad, without making their investment for new con-

struction liable to the lien of the deeds of trust or bonds, (Rec. the same references), but they were also stockholders in the Successor Company, having over $228,000 stock therein, (Rec. p. 492), of which $19,450 in gold was paid in, (Rec. p. 281), and they were, therefore, as stockholders and constructive trustees of the Galveston, Houston and Henderson Company, precluded from dealing with themselves in other capacities, so as to make a profit out of the trust property in their hands.

The utmost they could expect would have been the return of their net investment after a rigid accounting. (Cases before cited).

Instead of pursuing the simple course, which honesty and duty marked out for them, they charged the Successor Company with the most exhorbitant rates of hire for the lands and equipment, averaging about 14 per cent. per annum in gold on the cost of the lands and buildings, and 31 to 56 per cent. on the cost of the equipment; the Successor Company in both cases paying the entire expense of repairs, (Rec. p. 106, 703, 494, 496), and they further charge for the use of the Junction Railroad, on which they have paid in fact $2,974, the sum of $25,000 per annum as hire; so that, notwithstanding the receipt of about $5,000,000 from 1860 to to 1867, the Successor Company was charged as indebted, at the time of the appointment of the Receiver, to the Real and Personal Estate Association in the sum of $56,086 43, in gold, and to the Junction Company, in the sum of $99,113 53 in United States currency, without including interest, (Rec. p. 880, 892, 92, 97), and these rates of hire, occasioning this enormous deficit, were contracted by agreements between committees appointed by the successor company and the two other associations, both committees being interrested to get all there was for the latter, (Rec. pp. 494-503, 498).

A reasonable charge for hire of equipment would have been 15 per cent. per annum, (Rec. pp. 1030, 1038).

## XIII.—Payments in Excess of Expenses from Earnings.

In this connection it is pertinent to ascertain the amounts repaid to the several parties by a more particular examination of the evidence; and it will appear by the proceedings

of the stockholder's meeting of the Real and Personal Estate Association that the $36,000 previously loaned to the Successor Company, had been returned in May, 1862, (Rec. pp. 500, 281,-284, 896), and by subsequent orders of the stockholders, on the 19th October and 13th December, 1862, February 10th, May 20th, June 5th, September 24th, 1863, and subsequent days, (Rec. pp. 500 to 503, 286), dividends were made of return stock *at par*, to the aggregate amount of $223,392.50, exceeding the amount of cash capital put in by $68,067.50, (Rec. pp. 286-299); and we refer to the summary given by Mr. L'Estrange, a witness for the defendants, (Rec. pp. 297-299): "If the amounts divided among the stockholders in the R. & P. E. Association are considered either as return stock, or at the nominal value as dividends, then, in either case, the stockholders have received more than the original capital. If the defendants comprising the New Galveston, Houston and Henderson Railroad Company, the R. & P. E. Association and the Junction Company, are to be considered legally as agents or trustees for the old Company, and as only entitled to interest on their advances or loans of cash for carrying on the road, then they have been largely overpaid; if they are to be charged with what they have received from the earnings of the road and credited with hire of rolling stock and real estate at not above 25 per cent., they would still have been overpaid."

Besides these amounts, which only represent payments before the close of the war, the Real and Personal Estate Association, and the Junction Company, have also received for a part of the time, since the war, and before the filing of the Bill, hire, at the rate of $110,000 per annum, as well as large amounts expended in repairs of the property hired. In the letter adressed by Hitchcock to Algernon Jones, page 32 of Brief, under a resolution of the Successor Company, the highest amount then claimed to reimburse that Company for actual expenses, was $190,000 upon all the property, including equipment, depots and depot grounds, and repairs of the road, and an additional amount of $18,000 paid to the judgment creditors. The Successor Company, in this proposal, assumes to represent the entire property and to be willing to dispose of it, and inasmuch as since that time, January 26, 1861, they have been repaid more than this

amount, and have drawn all their subsequent expenses from the earnings of the road, they cannot reasonably claim anything more, unless interest be allowed them.

### XIV.—Defendants not Entitled to Interest.

As to interest, it cannot be contended that constructive trustees, holding the trust property wrongfully, are entitled to more consideration or greater allowances than are granted to trustees created directly by the act of the parties. As to these latter, it seems to be well settled, that while they are charged interest upon balances in their hands, and used by them, they are not entitled to interest upon voluntary advances, for the plain reason that they might in that way speculate upon the Trust Estate, and overburden it with debt without the consent of the beneficiaries.

### XV.—As to Fixtures and Extensions.

Another principle, which affects both the Junction Road, the new rolling stock and the depot-grounds and machinery, and subjects them to the mortgage lien, is, that the defendants have wilfully attached all this property to the Galveston, Houston & Henderson Railroad, under their management, and that they cannot now separate or remove these necessary adjuncts to the operation of that road.

1. The Junction Railroad is constructed upon a route which might have been properly adopted by the original Company. The charter of that Company (Section 2, Rec. p. 81), authorizes the building of "a railway from Galveston, by such course and such point at the city of Houston, as the said Company shall deem most suitable, thence by the most suitable and direct line to Henderson," and there can be no doubt that the Company might have used the route now taken by the Junction Road. And as the Junction Company was avowedly a mere agent of the successor Company, contrived to effect the objects of the latter (Rec. pp. 496, 497, 695), it cannot be considered as

standing in any different position from the successor Company, or as acquiring an independent route or line of road over the route of the original Company.

If the successor Company be in fact a trustee, then it is bound by the stipulations in the deeds of trust expressly providing that future acquired property along the mortgaged route of said road, that is to say, up to any point within the city of Houston, should be subject to the deed of trust, the same being properly an improvement or addition to the mortgaged property. The case in 25 Barb., 284, 308, 310, before cited, is very instructive upon this point.

2. In regard to the stations and station grounds at Galveston, claimed by the Real and Personal Estate Association, they have been destined and applied to the uses of the railroad, and have become an essential part of it. The repairs and the additions to the buildings and the purchase of machinery and tools, have been made out of the earnings of the railroad, and it is now impossible to distinguish how much of the present buildings or the cost of the grounds has been derived from the original investment of the defendants, or from the money for which they owe an account to the complainants.

Hughes *v.* Edwards, 2 Wheat, 489.
Pennock *v.* Coe, 23 How., 117.
Dunham *v.* Railway Co., 1 Wallace, 254.
Longstaff *v.* Meagoe, 2 Add. & Ell., 167.
Winslow *v.* Merchants' Ins. Co., 4 Met., 306.
Heath *v.* Williams, 25 Maine, 209.
Dow *v.* Sawyer, 29 Maine, 115.

3. The rolling stock, placed upon the railroad by the defendants, becomes thereby a fixture, and at most only entitles the purchasers to the balance of account due for it. Although there is no doubt that it is competent for an owner of rolling stock to hire it to a railroad, without losing his right of withdrawing it, still this privilege does not apply to one, who is subject to equitable obligations and accountability, to either the stockholders or the bondholders, growing out of his dealings with the road itself. And the ground we take, is, that the suc-

cessor Company, under its various phases, stands in no different position from the original Company, and must submit to the same responsibilities.

A common ground in support of our position as to all this additional property is, that it has been procured in great part by the use of the income of the road, which is a trust fund. This is particularly remarkable in regard to the equipment; for we find that at one time the sum of $17,576 87, was expended out of the earnings of the main road for the building of cars, (Rec. p 40,) which were afterward transferred to the Junction Company; and at another time, the successor Company advanced to the Junction Company, a loan, without interest, of $48,000, to enable the latter to purchase equipment, through Messrs. Pierce & Bacon, to be subsequently hired to the successor Company at about 32 per cent. per annum.

It cannot be contended that this was prudent and judicious management on the part of a trustee.

## XVI.—Individual Liability of the Defendants.

The excess of the amount of income and hire, received by the defendants from the time of the sale in 1860, to the appointment of the Receiver in this cause, over the amount invested by them in good faith in additions and improvements, is chargeable against them individually. Upon their part, they assert that they are liable only in a corporate capacity, if in fact they are at all liable; and the final decree sustained their view. (Rec., p. 1014.) But their liability is evident, since they are members of the Real and Personal Estate Association, formed as a joint stock company, without act of incorporation, and are not organized under any statute, general or special of any State.

The Real and Personal Estate Association was a co-partnership, and the members thereof are responsible as partners.

If it be contended that, as members of the two bodies professing to be corporations, which they formed with the means of the Association, they were not individually responsible; still it is equally evident that they are liable to the extent of

the capital stock of those bodies. The capital stock of the Successor Company was fixed by a resolution of its members at $228,518.16, (Rec., p. 492,) of which, as has been seen, only $19,450 was paid in, leaving $209,068.16 yet unpaid.

The capital stock of the Junction Company was $500,000, of which only $2,974 was paid, leaving $497,026 still to be contributed.

The total deficit in the paid up stock of both these self-called corporations was therefore $706,094.16, for which the individual members are still liable to the creditors of these associations.

Washington Benefical Society *v.* Bacher, 8 Harris, 429.
Bank of Virginia *v.* Adams, 1 Parsons, 534.
Ogilvie *v.* Knox Ins. Co., 22 How, 380, 387.
1 Chan. Case, 206.
19 Johns, 484.
3 Mason, 316.

The final decree should, therefore, establish this liability and compel a contribution from the stockholders.

## XVII.—Claim of Robert Pulsford.

Pulsford took an appeal from the final decree, but has not entered it or brought it up from the Court below.

The deed of trust in favor of Robert Pulsford was made in 1859, (Rec. p. 762 to 773). It appears that Mr. Pulsford had already advanced £9,000, for which he received as security nine hundred and twenty ($92.000) 8 per cent. bonds, acknowledged by him to be worth £18,400, and also four hundred and ninety-seven tons of iron rails; and he agreed to advance £10,000 more upon receiving an assignment of all the judgments then existing against the original Company, together with a deed of trust to P. C. Tucker, guaranteeing the payment of forty per cent. of the gross earnings and other advantages. Among such advantages Mr. Pulsford had the right to retain the bonds, then held by him at the price of fifty cents on the dollar, to be credited by him upon the debt, and also

the right to receive £20,000 in value of the 8 per cent. bonds, (Rec., pp.762, 767, 770.) He has so retained said bonds, and has received the whole amount due him on his last advance, except $15,000.39, (Rec., p. 503,) as is also shown by the receipts signed by Tucker as Pulsford's agent, (Rec., pp. 788 to 791,) and this balance is more than covered by the value of the iron rails and additional bonds.

Pulsford is thus, as we understand the evidence, very much overpaid; but if anything were yet due him, he would only have the lien of a fourth mortgage, although he might come in under the eight per cent. mortgage to the extent of the bonds of that issue held by him. As he has made no appearance in this Court, nor had his appeal docketed, he cannot feel much ground of complaint on account of the decree.

XVIII.—This complicated record merely shows the usual proceedings by bondholders against insolvent railroad companies on one side, and on the other an attempt on the part of judgment creditors, to resist the collection of prior and secured debts, and to abstract, in the meantime, the earnings of the property. Any fancied claim which those creditors might set up, on the ground of a privileged lien for construction, is denied by the case of Dunham *v.* Railway Co., 1 Wall, 354; and the principles for which they contended in support of their opposition to the enforcement of the deeds of trust would destroy the credit of all corporate securities, and make the association of capital impossible.

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With entire confidence in these conclusions, we trust that the Court will so reform the final decree as to enforce the lien of the deeds of trust against all the property held by any of the defendants in connection with the Galveston, Houston and Henderson Railroad, and to the full amount of their subscribed stock in their several associations; and in addition, that the Court will provide the proper mode of affecting a sale of the property and a liquidation of all the accounts. The evidence in the record already taken, is sufficient for this purpose; and the in-

dividual indebtedness of the defendants can be readily ascertained.

To this end the complainants ask that so much of the decree below as is appealed from by the appellants in No. 119, be affirmed, and that much of the decree as is appealed from by the complainants below, in No. 212, be reversed, and that the Court below be instructed to so modify its decree as to find that the mortgages embrace all the property described in the complaint as the property of the Galveston, Houston and Henderson Railroad Company mortgagor, but claimed by the Galveston, Houston and Henderson Railroad (Successor) Company, by the Galveston and Houston Junction Railroad Company, and by the Real and Personal Estate Association.

That the order of sale direct the sale to be made upon each mortgage in the inverse order of their priorities; that is to say upon the third mortgage first, subject to the amount found due upon the first and second mortgages, and then in the event of the second remaining unpaid for a limited time, that the premises be sold upon the second mortgage, and so on thereafter upon the first.

And that the defendants be held to account for the use and income of the mortgaged premises.

That said accounting be upon the following principles:

The account to be stated in the lawful money of the United States.

The defendants to be debited with the amount of so-called Confederate money received by them the same as if it were lawful money of the United States dollar for dollar, and so far as they paid out the same for operating expenses or moneys advanced by themselves, that they be credited therefor in the same way, and that the balance, if any, be charged to them in lawful money of the United States.

That no interest or hire be allowed on the account either way, but if any is allowed, that it be at a rate not exceeding the legal rate in Texas, viz.: 8 per cent. per annum.

That the defendants be held jointly and severally liable, and that a decree be entered against them personally to pay the amount charged to them on the account stated as above if any sum is found due from them.

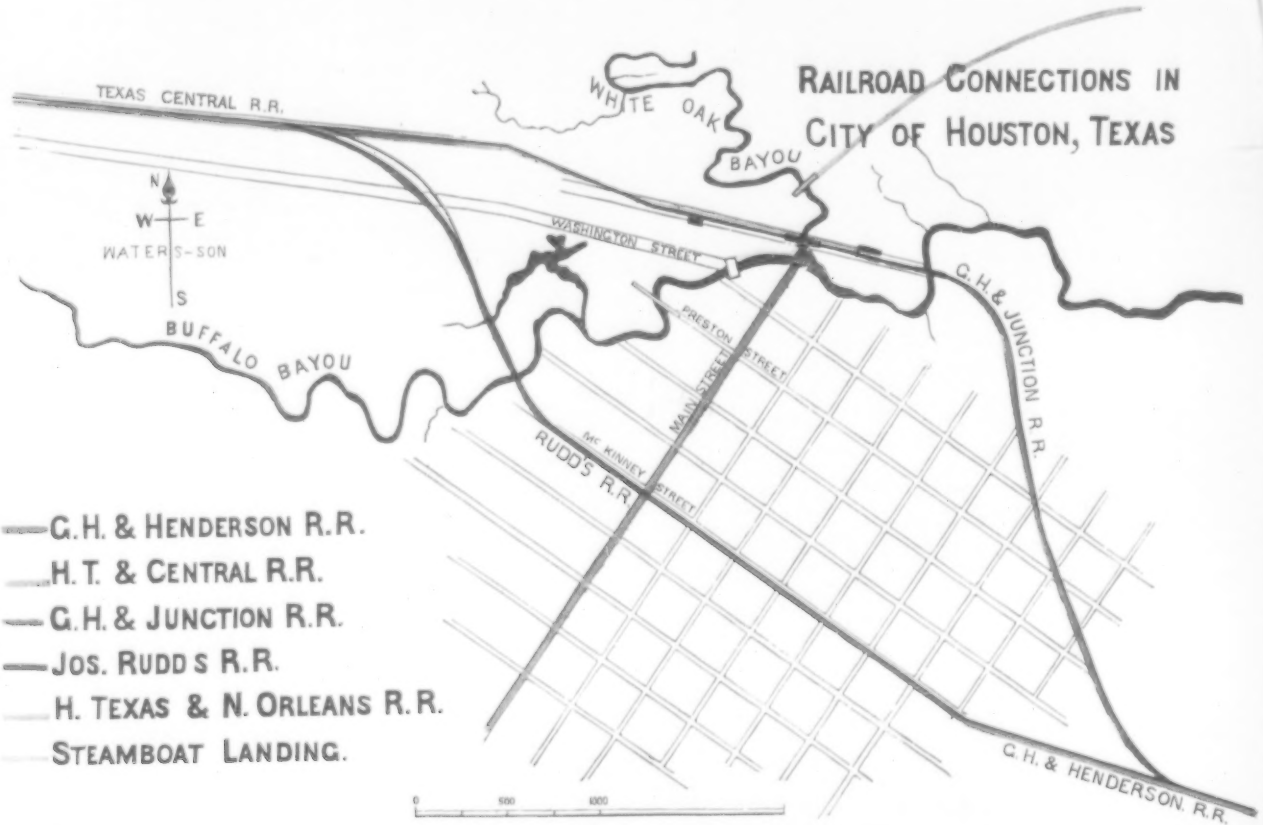
WM. G. HALE,
Counsel for Complainants,

Appellees in No. 119, and Appellants in No. 212.

MAP SHOWING THE RAILROAD & STEAMBOAT ROUTES

BETWEEN HOUSTON & GALVESTON, TEXAS.

G.W. & C.B. Colton & Co. New York.


RAILROAD CONNECTIONS IN
CITY OF HOUSTON, TEXAS
TEXAS CENTRAL R.R.
WHITE OAK BAYOU
N
W E
WATERS-SON
S
WASHINGTON STREET
BUFFALO BAYOU
PRESTON STREET
MAIN STREET
Mc KINNEY STREET
RUDD'S R.R.
G.H. & JUNCTION R.R.
G.H. & HENDERSON R.R.
0 500 1000
G.H. & HENDERSON R.R.
H.T. & CENTRAL R.R.
G.H. & JUNCTION R.R.
JOS. RUDD S R.R.
H. TEXAS & N. ORLEANS R.R.
STEAMBOAT LANDING.

# Supreme Court of the United States.

## DECEMBER TERM, 1870.

No. 119. THE GALVESTON, HOUSTON & HENDERSON RAILROAD COMPANY & OTHERS, *Appellants*, *vs.* N. A. COWDREY, & OTHERS, *Appellees.*

No. 212 N. A. COWDREY, & OTHERS, *Appellants*, *vs.* THE GALVESTON, HOUSTON & HENDERSON RAILROAD COMPANY & OTHERS, *Appellees.*

BILL IN EQUITY, BY COWDREY *et als.* *vs.* G., H. & H. R. R. CO. *et als.*, AND CROSS APPEALS FROM THE CIRCUIT COURT FOR THE DISTRICT OF TEXAS.

# Argument for Cowdrey and others, Plaintiffs.

BY JAMES GRANT.

Globe Steam Print, Davenport, Iowa.

# Supreme Court of the United States.

## DECEMBER TERM, 1870.

Grants

Nos. 119 and 212 N. A. COWDREY, & OTHERS, *vs.* THE GALVESTON, HOUSTON & HENDERSON RAILROAD COMPANY & OTHERS. } IN EQUITY.

*Appeal and Cross Appeals from the Circuit Court for the District of Texas.*

## Argument for Cowdrey and others, Plaintiffs.

### STATEMENT OF THE CASE.

The record of this cause is very large; the testimony very voluminous; the facts, not disputed to any material extent, and we shall endeavor to bring the salient points of the case before the Court by a recital of the facts, instead of the pleadings and proofs.

On the 7th of February, 1853, the Texas Legislature incorporated the Galveston, Houston & Henderson Railway Company, to build a railroad from Galveston, by Houston to Henderson. The corporation had all the usual powers of a corporation of this kind, and were authorized "generally, §§ 1 and 2 of the act, record page 81, to do and perform all acts necessary and proper for or incident to the fulfilment of its obligations: 1st, to locate, construct, own and maintain a railway from Galveston by Houston to Henderson; and 2, to make and own branches thereto; the persons named in the charter

were invested, §3, with the powers of the corporation, and the duties of directors, until such were elected; there were to be five directors, to be elected at a meeting in Galveston.

By the §9 of the act, the Company could acquire real estate, and mortgage the same for the construction and maintenance of the road; the mortgage to be signed in the name of the president and countersigned by the treasurer.

The Company, §10, was authorized to borrow money on their bonds and notes, at such rates as the directors might deem expedient. This act was amended by an act 10 July, 1854; p. 85, a grant was made to the Company of eight sections of land for every mile of road, and its powers to build a road and branches enlarged.

This act was amended by act 23 Jan., 1856; p. 85, which authorized the Company to connect with a road at Fulton, extended the time for completion of the first twenty-five miles to six months after 30 Jan., 1856, gave them all the benefits of the general law of 1854 to encourage the construction of railroads by donations of land, provided the Company, on or before the completion of the first 25 miles of their road, establish their principal office on the line of the road, with all the books, papers and documents of the company; required proof of this before they could have any land; required a majority of the directors to reside in the state, and all elections of officers to be held in the state; reserved the right to repeal the general railroad act, and applies to it the provisions of the act of 7 February, 1853, "to regulate railroad companies."

A supplemental act to this act of 23 January, '56, was passed 24 July, 1856, p. 86, providing that if twenty-five miles of road was completed by 1st May, '57, the Company was to have sixteen sections of land per mile under the act of 30 January, '54, and upon the completion of twenty-five miles in each year thereafter, to a like amount; the Company was allowed until 1st

November, '57 to complete 40 miles of road in order to save its charter from forfeiture.

The Company was required to abandon its claim for land, except under the act of 30 January, '54; to establish and keep, within six months, its principal office in the state, and there keep its records. All future meetings of the Company for the election of the directors and other officers were to be held in the state; and a majority of the directors were to be citizens of the state thereafter.

On November 20, '57, an act was passed for the relief of said Company, and amending its various laws, p. 468, wherein the Company was relieved from all forfeitures to that date, and renewing and continuing in all force all the laws in its favor; required fifteen miles of the forty miles, then unfinished, to be completed by 1st November, '58; continued in its favor the provisions of the general railroad law January 30, '54; renewed the grant of sixteen sections per mile; required a performance of the conditions of 3d § of act of July 24, '56, as to place of office and elections, and "that the Company should thereafter be liable and bound in all respects, for all debts incurred, and contracts made thereafter by it, in the same manner, and with the same effect as it was previous to 1st November, '57.

The said general law of Texas, 19 Dec., '57, Paschal's digest 820, §4912, and following: Provided, that the road bed, track, franchise, chartered rights of any railroad company, should be subject to the payment of the debts and legal liabilities of the company; authorized the levy and sale of a railroad, bed, track, franchise, chartered powers and privileges, either in a general judgment or decree in Equity, under a trust deed, or otherwise: made the road bed, charter, franchise and privileges one entire thing to be sold together, by execution, order of sale, deed of trust or other power; gave to the purchasers all the rights, powers, and made them the owners of the charter, as if

they were the original company, and authorized them to complete the road under its charter and the general laws of the state. This law made the officers of the old corporation, after such sale, trustees of the Company, to settle its debts, with the right to sue and be sued, and jointly and severally liable for all the effects of the Company coming to their hands.

The constitution of Texas of 1866—general provisions §36—record 469, Paschal's digest, p. 493—repeals this law as to sale of franchise on judgment sales, but continues it in force as to foreclosure sales, or mortgages or liens created in the manner prescibed by law.

Under the charter of 7 February, 1853, and acts amendatory thereof, the Galveston, Houston & Henderson Railroad Company was organized by subscriptions of stock and the election of a directory at Galveston, answer 71, of five persons, Richard B. Kimball, president; John H. Hand, treasurer; and after its organization, Kimball, president, H. Gibbins, secretary, and John D. Hand, treasurer, resided and kept their offices and records of the Company in New York, and the management of the Company was wholly conducted in New York and Europe, answer 71, until the passage of the act of 24 July, '56, and November 20, '57, within six months of which time, 20 Nov., '56, the office and records were brought back and kept in Texas—Kimball's deposition, 401: the election of directors after these acts was held in Galveston in May, 1857.

On the 1st December, '53, the Company, by a vote of its directors, Kimball's deposition, 401, executed to Masterman, Moore and Wm. Kent a first mortgage for $750,000, or £250,000 sterling, on "the railroad, constructed or to be constructed from Galveston to Houston, with the railways, rails, bridges, fences, privileges, rights and real estate now owned or hereafter to be owned by the Company in connection with the railroad

from Galveston to Houston, and all the tolls, incomes, issues and profits (whenever the Company should be in default, in making payment), to be made from the same, all the franchises of the Company, all the lands used and occupied, or which may hereafter be used and occupied, for railway depots and stations, on said road from Galveston to Houston," "in trust for the persons who should become the holders of $750,000 or £150,000 sterling of its bonds, secured by that mortgage, at 6 per cent. interest, issued by said Company under the act of 7 February, '53, subject to the possession of the Company so long as th ... may the interest on said bonds; said mortg ... the property of the Company, ther ... acquired; if default was made in ... three months, trustees were author ... sion of the property, and collect t... the same by public auction."

1869

James Kent, alone of the trustees accepted this trust, and about $700,000 of these 6 per cent. mortgage bonds were issued.

On the 1st of June, '55, page 13, the Company made a second mortgage on their property, describing it in the same language as the first to Judge Kent and Chas. B. Haddock, trustees, to secure the payment of $750,000, in bonds with 10 per cent interest; this mortgage included the proceeds from the sale of 542,720 acres of land, granted, or to be granted by the state of Texas to aid in building the same: "This conveyance is executed to take the place of a conveyance of 1st December, '53, to secure $750,000, or a like amount in pounds sterling, represented by fifteen hundred six per £100 bonds—and the issue of the bonds herein referred to, can only take place on the cancelling of a like amount of six per cents., so that this shall be a first lien on the bonds and donated property." Haddock accepted this trust by indorsement on it.

On the 8th of October, '57, page 18, the said Galves-

they were the original company, and authorized them to complete the road under its charter and the general laws of the state. This law made the officers of the old corporation, after such sale, trustees of the Company, to settle its debts, with the right to sue and be sued, and jointly and severally liable for all the effects of the Company coming to their hands.

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from Galveston to Houston, and all the tolls, incomes, issues and profits (whenever the Company should be in default, in making payment), to be made from the same, all the franchises of the Company, all the lands used and occupied, or which may hereafter be used and occupied, for railway depots and stations, on said road from Galveston to Houston," "in trust for the persons who should become the holders of $750,000 or £150,000 sterling of its bonds, secured by that mortgage, at 6 per cent. interest, issued by said Company under the act of 7 February, '53, subject to the possession of the Company so long as they should pay the interest on said bonds; said mortgage to embrace all the property of the Company, then, or thereafter to be acquired; if default was made in paying interest for three months, trustees were authorized to take possession of the property, and collect the income and sell the same by public auction."

James Kent, alone of the trustees accepted this trust, and about $700,000 of these 6 per cent. mortgage bonds were issued.

On the 1st of June, '55, page 13, the Company made a second mortgage on their property, describing it in the same language as the first to Judge Kent and Chas. B. Haddock, trustees, to secure the payment of $750,000, in bonds with 10 per cent interest; this mortgage included the proceeds from the sale of 542,720 acres of land, granted, or to be granted by the state of Texas to aid in building the same: "This conveyance is executed to take the place of a conveyance of 1st December, '53, to secure $750,000, or a like amount in pounds sterling, represented by fifteen hundred six per £100 bonds—and the issue of the bonds herein referred to, can only take place on the cancelling of a like amount of six per cents., so that this shall be a first lien on the bonds and donated property." Haddock accepted this trust by indorsement on it.

On the 8th of October, '57, page 18, the said Galves-

ton, Houston & Henderson Railroad Company made a third trust deed, or mortgage, to Wm. Kent and Chas. B. Haddock, to secure $2,625,000, eight per cent. bonds, covering the said railroad for 75 miles, and all the land granted to the Company by the state of Texas, 10,200 acres to each mile of completed road.

This mortgage authorized the parties to take possession, after default, in sixty days, and was "intended, in part, to take the place of the 10 per cent. mortgage of 1st of June, '55."

The 1st mortgage bonds were due on 1st December, [illegible], the 2nd, on 1st June, '65, the 3rd, on 1st January, [illegible] with interest payable half yearly. Kent did not accept the trust of the 3rd mortgage; Haddock did by indorsing the bonds. Masterman and Moore did not accept the trust under the first, and all the trustees named are dead.

A part of the first, or six per cent. mortgage bonds, were sold or hypothecated, and the money expended in building the road; nearly all of the second, or 10 per cent mortgages, were sold or hypothecated, and used to take up in part the six per cent. mortgage; £49,000 of the first mortgage are outstanding; about $700,000 of the second, and $1,900,000 of the third.

The plaintiffs are *bona fide* purchasers of various numbers of all classes of the bonds, having begun the purchase in 1864, and paid for them at the rate of 30 to 75 per cent. flat.

The Company was, at all times, embarrassed; was constantly making sacrifices to meet pressing necessities, and asking legislative relief from forfeiture. The mortgages are all executed in due legal form, and recorded according to the laws of Texas; and the defendant's in the suit, in their answers, admit notice thereof. it is proved affirmatively, 401, that these bonds and mortgages were authorized at meetings of the board of directors held in New York, and they are on their face executed by the president and treasurer of the corpo-

ration according to the §§9 and 10 of the act of 7th Feb., '53, and the bonds were sold in the open market in America and Europe, or hypothecated for loans of money, and afterwards sold by the parties with whom they were hypothecated.

All of the six per cent. bonds were cancelled but about £49,600; none of the second, and of the third about $1,900,000 were issued.

The plaintiffs, owners of £64,458 of the six per cents., including interest, $429,670 of the 10 per cents., and $37,456 of the eight per cents., file a bill to forclose all these mortgages in their order, as well for themselves as all other creditors, holders of said bonds, who may join them and share in the cost.

A fourth mortgage was given on 2d May, 1859, to Robert Pulsford, holding £10,000 of the eight per cents., to secure said £10,000 of bonds and an advance of £10,000, to pay up certain judgments against the Galveston, Houston & Henderson Railroad Company, subjecting the lands and property of the Company, real and personal, and 40 per cent. of the gross earnings as security to pay said £10,000 bonds already secured by deed of trust or mortgage, and also an advance, if made, for £10,000 more.

The railroad was begun at Virginia Point, five miles from Galveston, and by means furnished in part by Pulsford, and in part by the city of Galveston, ($100,000 by the city) to build a bridge across the Bay of Galveston, the road, in 1860, was finished from Galveston to Houston, 52 miles from Galveston.

In the year 1859, Kimball, who had been president to that date, resigned; the following persons, defendants in this suit, were elected directors: Wm. R. Smith, Jacob L. Briggs, Nabor B. Yard, Alfred F. James, Ebenezer R. Nichols, Robert Mills, George Ball, Julius Kaufman, Jacob C. Kuhn, Thomas M. League, Thomas McMahan, and John Shackelford.

These gentlemen, in that year, took the active man-

agement of the road, and in 1859 and 1860 they found it in debt about $229,000, of which a large part was owing to themselves.

In 1859, judgments were obtained, by agreement, for themselves and various other persons, among them Pulsford and St. Cyr, the French Consul, who, by the testimony of Shea, defrauded the corporation out of thousands; and on 5th July, 1859, all of these creditors, 466, agreed to stay execution for one year.

In March, 1860, these directors, creditors, and those other creditors, in violation of this agreement entered of record, caused executions to issue, and sold the railroad property and franchises, and bought it themselves, by one Terry, and organized themselves into a new Company, under the railroad law referred to, called by the same name, and designated in these proceedings the successor Company. After such sale, these creditors held meetings, and organized the successor Company on 23d March, 1860, and elected the following directors, 492: Alfred F. James, T. H. McMahan, L. M. Hitchcock, I. C. Kuhn, J. Kaufman, I. Sealy, I. Sorley, E. B. Nichols, I. I. Hendley and Robert Mills, leaving out Smith, Shackelford, and League and Yard, partners of Briggs and Ball.

No person was admitted into the new corporation but the creditors, and the new Company creditors borrowed money of Jochusch, Ball and Gilbert; paid to themselves and other creditors 10 per cent. in cash, and appropriated 25 per cent. of the gross earnings of the road to pay themselves. Certificates of stock were authorized in the new Company for the debts due for the construction of the road, purchase of rolling stock, services rendered, or *bona fide* indebtedness of the Company. All of the defendants in this suit, including the old creditors, were creditors of the Galveston, Houston and Henderson Railroad Company. The execution sales took place by agreement of the creditors, and Terry bid off the property for $29,000, with-

out paying a dollar in money; and so indifferent were the parties to the rights of the bond creditors, that they never had their executions returned or deed recorded until this suit was commenced.

These same parties, directors and stockholders, by reason of being creditors of the old Company and directors of the successor G., H. & H. R. R. Co., at the same time organized a real and personal estate association, not incorporated, for "the purpose of furnishing rolling stock and depot grounds in Galveston for the Galveston, Houston & Henderson Railroad Company" (which road, in their answer, they say they had purchased, "intending to settle with such bond creditors as were *bona fide*, for their advances, on fair and equitable principles, and for the purpose of dealing justly and fairly with all persons who might have claims against the same"), and leasing the stock and grounds to the G., H. & H. railroad corporation, of which they were the sole members, "because they were not willing to invest their private credit and capital in said railroad in a manner to subject it to said pretended bonds and mortgages" (record, p. 77), subscribed $195,000 to said "association not incorporated:" paid 85 per cent. in gold — that is, the partners furnished $168,000 in gold, to purchase real estate and rolling stock to lease to said Galveston, Houston & Henderson Railroad Company, of which they were the sole members — and they leased one-half of the real estate to their own Galveston, Houston & Henderson Railroad Company, at a rental of 14 per cent. on the whole purchase and rolling stock, at from 32 to 48 per cent. per annum of its original cost, and when this bill had been filed, they had been paid back their entire money furnished, with 25 per cent. interest, 299, and they had assets, when this suit was brought, amounting to $329,439.15, of which $129,337.30 was for rents of this depot ground and rolling stock, 297; and this rent was made greater by making yearly rests at 12 per cent., and thus com-

pounding interest upon interest, and as rent was paid it was re-invested in rolling stock and hired to the Galveston, Houston & Henderson Railroad Company, and they had divided, in dividends, according to their own accounts, 75 per cent.

On the 15th January, 1861, at a meeting of the directors of the successor Galveston, Houston & Henderson Railroad Company, a resolution was adopted, 497, to apply to the legislature to incorporate a new railroad company to connect with the Texas Central, around or through Houston, and on 8th April, 1861, the stockholders and directors of the successor Galveston, Houston & Henderson Railroad Company were incorporated as a company, under the name of the Galveston & Houston Junction Company, to build a connecting railroad from the Galveston, Houston & Henderson Railroad to the Texas Central, through the city of Houston. The capital was first $100,000, and increased to $500,000 by act of 25th February, 1863. Under this act, the same persons who were stockholders and directors in the successor G., H. & H. R. R. Co., and owners of the real and personal estate association, were incorporated, and paid up $2,974 in gold, and $35,000 in confederate notes, and built the connecting road, under two miles in length, at a cost of $65,986.29, page 90, of which sum $18,344.70 was paid by the "exchange tickets" (property) of the G., H. & H. R. R. Co., loaned to the G. & H. Junction Co.; and of this cost, $19,000 was represented by a note and deed of trust for iron purchased of the Houston, Trinity & Tyler Railroad Company, not paid when this suit was brought, and paid since, out of the earnings of the G., H. & H., and $12,000 of rolling stock purchased by the same parties of the same parties, and leased by the Galveston & Houston Junction Company to the G., H. & H. R. R Co. at a rental of $7,500 per year — over 50 per cent.

This G. & H. Junction Co., that paid in $2,974, gold,

capital, and received $18,000 of the Galveston, H. & H. R. R. Co., have a balance of assets of $180,000, p[illegible] after paying dividends of 21 per cent. on a capital of $500,000 all made from earning[illegible] stock and railroad leased to G., H. & H[illegible] reinvested from time to time, and have b[illegible] paid back, and overpaid, all their investments at 25 per cent.—pages 298, 299, in connection with 701.

This Galveston & Houston Junction Co. was formed owing to "the embarrassed condition of the G., H. & H. R. R. Co. (successor Co.), and the cloud on the road by reason of said alleged bonds and mortgages, and became a separate and independent company, free from embarrassment, was indispensable to procure funds and credit to build and effect said junction"—page 97.

The Galveston, Houston & Henderson successor Railroad Co. the real and personal estate association, and the Galveston & Houston Junction Co. are all owned by the same stockholders, managed by the same persons, and a transfer of a share in one carries a transfer of a like proportional interest in the others. The partners in the real and personal estate association are partners in the same proportion in the other two.

On the 1st of May, 1865, the rolling stock, ties and machinery purchased in the name of the real and personal estate association, were transferred, while under lease to the G., H. & H. successor Co., to the G. & H. Junction R. R. Co., and leased at the same enormous rates to the G. H. & H. successor Co., and not a dollar paid in the transaction. Separate accounts were kept by each one of the companies; and though large profits were made by the G., H. & H. R. R. Co., the rents and profits all went to the other two companies. The transactions during the war, except the $2,974 gold payment of the G. & H. J. Co., were all in confederate money. The records of the G., H. & H. Co. show con-

Gold & coupon Money

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fiscations of property paid to the confederate government, and $800,000 of confederate money was in hand in the successor Company at the close of the war.

The knowledge of the existence of the trust mortgages is admitted by all the defendants; and they all, both by their answers and depositions, say, Sealey's 647: "After the transfer of the road, in March, '60, a new Company was organized, and this new Company paid the judgment creditors 10 per cent. in money;" and assumed the balance of the judgment debts and interest $194,000, and assumed $34,000 loaned it by the city of Galveston, not in judgment, in all $288,000, and agreed to pay 25 per cent. of the gross earnings of the road; and in order to enable them to open out the road a large amount of money had to be raised, and to save these advances and property thus acquired against danger of liabilities of the old Company—and to guard the actual outlay from these liabilities, an association called the real and personal estate association was formed, and paid 10 per cent. to Galveston, Houston & Henderson Railroad successor Company, who paid it to the creditors, and they paid into the association 75 per cent. in money, and with this money bought lands for depot, bought rolling stock, and loaned money to the Galveston, Houston & Henderson Railroad Company to buy iron, ties, and to put the road bed in order." Sorley, a member of the Company, 610, says: "Immediately after the organization of the new Company, in '60, the chief engineer was directed to furnish estimates necessary to put the road in suitable condition for safer transportation. Large purchases were made of materials; the money was obtained by installments paid from time to time by the members of the real and personal estate association to the trustees of the association."

"The title to the land, rolling stock, &c., bought with this money was taken in the name of the trustees for the reason, that some year prior to '60, some of the

officers and agents of the original Galveston, Houston & Henderson Railroad Company had spoken freely with the citizens of Galveston about their varied successes and difficulties in raising money to complete the road; it was believed a large number of bonds had been issued, some two or three classes, some more meritorious than others; that these classes were not equally meritorious as to liens; the holders of some dissatisfied with the holders of others, and the Company was bankrupt. A number of the contractors and employees, in Texas, remained unpaid their just dues, obtained judgment, sold the road and became purchasers themselves. Having possession, it required [illegible] repair it before they could hope to receiv[illegible] They feared that every dollar they ex[illegible] track, road bed, or invested in the name of the G., H. & H. R. R. Co., might become subject to said mortgages, and that when the property was sold under the mortgages the reimbursement from the outlay was far from certain. They, as prudence dictated, organized themselves into a real and personal estate association, appointed trustees and furnished them with funds to purchase property, rolling stock, &c.; as far as practicable, took the title to all the property in the names "of these trustees." The Company, before the sale, had one, perhaps two, engines, and a dozen box and platform cars.

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In '60, Judge Kent went to Galveston and took initiatory steps toward taking possession, forclosing the mortgages, but ~~before~~ he commenced suit, the war broke out, and the road, being in the enemy's country, he was unable either to take possession of the mortgaged property or ~~institute~~ any proceedings in the courts.

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was answered by a resolution that if a proposition was made to buy them out for cash, the entire interest of the Company in the road bed, franchise, rolling stock and other property of this Company, such a proposition would be favorably received," 497.

Thomas W. Pierce, one of the creditors and corporators in the new companies, was a purchasing agent or seller of rolling stock, &c., to the new Company. He was allowed enormous prices for everything; engines and cars at 25 per cent. above their market value, and he and his officials furnished ties cut from the scantest forests of New England, carried by sea three thousand miles to Galveston, for this railroad at $1.00 each, when the road was built through a forest from which they could have been cut or sawed and furnished, at less than the cost of transportation from Boston to Galveston; and some of the defendants allowed this railroad to be sold for taxes and bought it for themselves, when they claimed that they were the owners in possssion (deed–page).

The evidence shows that a reasonable rent for real estate in Galveston was 10 per cent of its cost, for railway machinery, 15 to 25 per cent.

At the first term of the court after the war, the plaintiffs filed a bill for themselves and other bondholders to appoint a receiver to take possession of the road, and to forclose the three first mortgages to all the property, and make all the defendants account for the rents and profits.

Pulsford, the holder of the fourth mortgage, who was one of the judgment creditors, who purchased the road, came in as a co-defendant, and by cross bill sought to establish a prior lien.

The defendants answer set up the purchase under their judgments purchase, and asked to be reimbursed their outlay according to the principles of Equity, and when this offer was formally accepted by the plaintiffs, it was declined, and the cause was tried

on bill, answers, cross bill and answers, replication and proofs.

The court below decreed that the mortgages were valid, and ordered the sale of the property under the first three. Pulsford's bill for a superior lien was dismissed. The court refused to require of the defendants an account, and held that the property put into the road by the defendants as owners of the real and personal estate associations and the Galveston & Houston Junction Railroad Company, was not subject to the mortgage lien.

All parties appealed; but Pulsford has not prosecuted his appeal in this court.

answer 25 Nov Br

## POINTS OF LAW ARISING ON THIS RECORD.

1. The first question made is the validity of these trust deeds or mortgages, which are defined in 2 Washburne on real property, 80, "to be rather like mortgages, than mortgages in fact"; and by Dillon in 11 Philadelphia Law Register, 648, "to be in substance the same thing as a mortgage with a power of sale."

These trust mortgages are regular in form, according to the law of Texas, and the act creating this railway charter; are regularly recorded, and apparently good security for the debts named therein.

Several objections are made to them by the answers: 1st, the power to make them is utterly denied. This objection is fully and completely answered by the §§9 and 10 of the act, which authorize the corporation "to sell or mortgage its real estate for the construction or maintenance of said railway, and requires the president and treasurer to sign the deed of alienation or mortgage, and impowers "the directors to borrow money on Company's bonds or notes," and after these debts were created, the Legislature by act of 20 Nov.,

'57, validated them, "provided that the Company should be liable and bound in all respects for all debts incurred in the same manner and to the same effect as it was previous to 1 Nov., '57;" act copied in record 469.

"All corporations have the absolute *jus dispenendi*, and are unlimited in its exercise, except when restrained by law.

"A corporation created with power to purchase, hold and convey such and so much real estate, &c., has authority to borrow money to erect buildings and secure the same by its bonds and mortgages on its real estate."

Barry v. the Merchants' Exchange Co., 1 Sandf. ch 280.
Richards v. Railroad Co., 44 N. H. 135.

And the grant of power to build said railroad would authorize the Company to mortgage its road bed or other property and its franchises.

Jackson v. Brown, 5 Wendell, 590.
Fay v. Noble, 12 Cushing, 1.
Jesup v. Bridge, 11 Iowa, 572.
Dana v. Bank U. S., W. & S., 223.
Susquehanna Bridge Co. v. Insurance Co., 3 Md., 311.
Whitewater Canal Co. v. Vallette, 21 Howard, 415.
Richards v. M. & C. R. R. Co., 44 N. H., 127
Gordon v. Preston, 1 Watts, 385.
Bardstown & L. R. R. Co. v. Metcalfe, 4 Metcalfe, 199.
Alen v. Montgomery R., 11 Ala. R., 437, 15 do, 472, 28 do 321

2. It is urged, that the G., H. & H. R. R. had no power to mortgage the franchise of the corporation, therefore it could not mortgage its property.

In England, 2 Redfield, R. M., 507, the acts of parliament only permit the tolls and future earnings of the corporation to be mortgaged; "but it seems to have been considered, in some of the American states, that railway companies, upon general principle, possessed the power to mortgage their effects in such a mode as to transfer the beneficial use of the franchise for the benefit of the creditors." "The mortgage, as a mortgage of property, 2 Redfield, 514, is valid, upon the

general principles of the law of corporation." A court of Equity where the franchise cannot be mortgaged, can make the mortgage of the property available to the creditors.

In Hall v. Sullivan, R. Co., cited in Redfield, 517, Mr. Justice Curtis expressed the opinion: "The franchise, to be a corporation, is not the subject of sale, without provision of law to do it, but the franchise to build, own and manage a railroad and to take tolls thereon, are not necessarily corporate rights, and there is nothing in their nature inconsistent with these being assignable. There is nothing in the particular terms of the grant of these franchises which expressly restrains their exercise to this corporation alone."

There can be no reasonable doubt of validity of these mortgages upon any of the questions made on the charter or subsequent ratification, or general law authorizing the sale or judgment and execution, which would necessarily imply power to mortgage the "franchise."

The third mortgage was made 8th Oct., '57, prior to 1st Nov., '57. The general law of 19th Dec., '51, in express terms, Art. 4912, Paschal's Digest, 820, renders the road bed, franchise and privileges of all railroad companies then or thereafter created, §4909, "subject to the payment of the debts and legal liabilities of the company, and authorizes them to be sold by general execution, order of sale, deed of trust or other power." This act authorizes and validates the whole of the plaintiffs' mortgages in language as plain as it can be written, and all rights under mortgages created under it, or validated and authorized by it, are preserved in §36 of the repealing clause of the constitution of 1866.

The power to make these mortgages was expressly granted; the authority to sell the franchise was conferred; the mortgages were ratified by the state, and the repealing clause of the constitution does not affect

the right to sell under mortgages made or liens created in the manner provided by law.

Paschal, 943, §36.

3. The defense of fraud in the issue of these bonds, totally fails as to the plaintiffs. They are proved to be *bona fide* purchasers. The argument that it was the duty of the officers to take up the first mortgage bonds with the proceeds of the second, and of the second with the third, so far as *bona fide* holders are concerned, is not worthy of consideration.

4. It is argued that these bonds are void, because the directors held a meeting and voted to issue in New York, and not in Texas.

If the board of directors had the authority, under the charter, to give these mortgages, the purchaser was not bound to inquire whether they were ordered to be issued at a regular and proper meeting at a proper place. The corporation and its assignees are estopped on that question.

Knox Co. v. Aspinwall, 21 Howard, 545;
And many subsequent cases in this court.

But if it was the duty of the holder to take notice of such a fact, the directors were not the corporation, but its agents, and could lawfully meet in New York, or elsewhere out of Texas.

Bank of Augusta v. Earle, 13 Peters, 521;
Tombigbee R. R. Co. v. Kneeland, 4 Howard, 16;
Bard v. Poole, 3 Kernan, 495;
McCall v. Byram, 6 Conn., 428;
Arms v. Conant, 36 Vermont, 746;
Cary v. C. & Z. R. Co., 29 Barbour, 50;
Kennebeck & Co. v. Augusta, 6 Gray, 208;
McLure v. M. & L. R. Co., 13 Gray, 124;
New York T. D. Co. v. N. J. Oil Co., 3 Duer, 648;
Ohio L. & T. Co. v. Mer. I. & T. Co., 11 Humphrey, 1.
Merritt v. Vansantford, 34 N. Y. Ap., 209;
Ohio & Miss. R. R. v. McPherson, 35 Missouri, 13;
Wright v. Bundy, 11 Ind., 398.

These two last cases were on contracts made by the directors, who are agents of the corporation, not the

corporation. The Missouri case was on a subscription to stock, where the organization was out of the state of creation. The Indiana case was on a mortgage made by the directors, who are not the corporation, but its agents out of the state, and is precisely like the case at bar in that respect. There are two cases, Miller v. Ewen, 14 Maine, 509, and Freeman v. Machias Co., 38 Maine, 343, which hold that the stockholders' meeting to organize the company must be in the state of its creation, but that the directors may meet out of the state. The various cases cited conclusively establish the law to be, that the directors are the agents of the corporation, and they may meet in any other state and make any and all contracts which are authorized by their charter.

But more than all this, the state of Texas, by its act of January 23, '56, and November, '57, recognized and validated both the meetings of the board and the making of these contracts, and required the directors thereafter to meet and keep their offices in Texas.

WANT OF PARTIES.

1. Objection was made below that Pulsford was not a party. He came in, answered and filed a cross bill. That the Houston, Trinity & Tyler R. R. Co. subsequent mortgagers of iron and rolling stock, were not made parties. Nothing was asked of them, and their mortgage is not disputed; they were not necessary parties. The same principle applies to the city of Galveston.

That the trustees were not parties. They were ~~all~~ who accepted dead, and a court of equity, never permitting a trust to fail for want of a trustee, has jurisdiction to appoint new ones.

2 Story's Equity, §527;
And other cases cited by Dillon in Vol. 2, new series of Law Reports, 709;
Story's Equity Pleading, §229.

That the plaintiffs cannot foreclose. The power of sale in these trust mortgages is cumulative, and does not exclude the right of foreclosure by bill in equity.

Eaton R. R. Co. v. Hunt, 10 Indiana, 457;
Sinking Fund Com. v. N. B. K., 1 Metcalfe, 174.

The plaintiffs have filed this bill in their own behalf, and all others like situated, the parties being very numerous; and this is justified not only by the 51st rule of the court, but by the general practice of courts of equity.

1 Daniels' C. P., 229;
Story's Equity P., §§ 99. 101, 102;
Mitford's P., 167;
Hallett v. Hallett, 2 Paige, 18.

2. Objections to the decree by the plaintiffs. The court below held, that the additional railroad property, rolling stock and track, did not belong to the mortgaged property; that the defendants were not bound to account for the earnings of the road, and for the additional stock put on the road, or the extension of the road to the Texas Central.

The defendants are before the court in three nominal interests: First, as officers of the original G., & H. H. Co.; second, as officers and stockholders of the successor Company; and third, as such stockholders, organizers and creators of the real and personal estate association and the G. & H. Junction R. R. Co., all three having the same interest, and the two latter got up for the avowed purpose of evading the mortgage liens.

The court below expressed the opinion that no objections could be raised to the claim of the judgment creditors' sale in this proceeding. This is not the law in the sense applied by the court; but whether it is or not, we propose to show that the defendants are precisely in the position of executors of their own wrong, or usurping trustees and agents of the bondholders under the trust deeds.

The defendants issued their executions in violation

of the judgments, which provided for a stay of execution, and they purchased the property themselves.

"A judgment creditor proceeding *in invitum*, is not a *bona fide* purchase."

2 Story's Equity J., 1502.

"A judgment creditor by elegit is not to be treated as a *bona fide* purchaser," "and cannot hold the estate of a debtor mortgagee, except subject even to an equitable mortgage, though he had no notice thereof," 2 Story's Equity, 1503, b. "The more I consider this case, the more satisfied I feel that I stated the general principle correctly in Langton v. Horton (1 Hare, 547), when I said a creditor might, under his judgment, take in execution all that belonged to his debtor, *and nothing more*. He stands, in the place of his debtor, subject to every liability under which the debtor has placed himself, "whether by trust or mortgage, (Whitsforth v. Guagin, 3 Hare, 416) — and other cases cited in 2 Story's Equity," page 1503, b.

"A purchaser of the legal title, who receives his conveyance merely in consideration of a prior debt, is not entitled to protection as a *bona fide* purchaser," (Willard's Equity, 256; Jewett v. Palmer, 7 John. C R., 65; Padjett v. Lawrence, 10 Paige, 170), "because he has lost nothing."

"Patrick is not a *bona fide* purchaser, as he bid in the property under his own judgment for an antecedents debt, paying no new consideration therefor; he took the title subject to the equitable lien for the purchase money."

Arnold v. Patrick, 6 Paige, 316.

The defendants, directors of the old corporation, and the new members coming into its management, by an execution sale in violation of their own contract in the judgment, are not *bona fide* creditors, but trustees in their own wrong, seeking to defraud the mortgagees for whom they were trustees.

The directors of a corporation are its agents, Angel,

§279, 280; and "the directors and managers of insolvent corporations are the trustees of its funds as well for its creditors as for the corporation, and cannot use them for their own benefit, to the injury of other creditors."

Richards v. N. H. Ins. Co., 43 N. H., 163.
Howard v. R. R. Co., 7 Wallace, 415.

The defendants were, in law, in no better position, when they organized a new corporation, than when they were directors of the old corporation.

"The directors of a corporation cannot speculate with the funds or credit of the Company and appropriate to themselves the profits of such speculation. They cannot, in making sales or purchases for the Company, take advantage of their position as directors, and either directly or indirectly speculate upon the Company."

Redmond v. Dickerson, 1 Stockton, 507.

"The directors and stockholders of a bank cannot, by making an assessment to which the creditors of the bank are not parties nor consenting, deprive such creditors of a remedy against them for the breach of their duties;" and this rule applies as well to the parties who came into the bank by purchase, without payment of consideration as those who were original parties to the fraud.

Schley v. Dixon, 24 Georgia, 273, 280.

"A majority of the directors of a corporation conveyed the property to two of the stockholders under an agreement by which the directors were to be interested in the purchase, and with the two stockholders, A and B, were to pay therefor. A and B procured an assignment of a judgment and were proceeding to sell the property, when a junior judgment creditor applied for an injunction, charging that the transaction was a fraud. The injunction was allowed, and a motion to dissolve on answer refused."

Smith v Loomis, 1 Halstead ch. R, 60.

"The directors of a corporation, in the management of its affairs, are only trustees for its creditors and stockholders — and are bound to administer its affairs according to its charter and good faith. If they fail in either they are both liable for a breach of trust, and may be held to account in Equity."

Hodges v. New England, S. Co., 1 Rhode Island, 312.

"If the directors of a bank allow its stockholders to withdraw its funds without security, and use them in their private business, such conduct is a fraud on its creditors, for which both directors and each agent engaged in it will be liable for the amount traced to his hands and the profits on its use."

Bank St. Mary's v. St. John, &c., 25 Ala., 566.
And cases there cited.

"A director in a railroad company took a deed in his own name, for land purchased for the benefit of the company, and refused to convey it; held, that he was guilty of a fraud."

Buffalo, N. & E. R. R. v. Lampson, 46 Barbour, 534.

Where the managing members of a corporation which is embarrassed unite with a new corporation, and transfer the property to the latter, to hinder, delay or defraud the creditors of the former, such transfer is fraudulent and void.

Booth v. Bunce, 33 New York, 139.

No person is permitted to purchase property and hold it for his own benefit, when he has a duty to perform in relation to it which is inconsistent with the character of a purchase on his own account, and for his individual use and benefit.

Van Epps v. Van Epps, 9 Paige, 238.

The old directors became the voluntary trustees of the creditors of the corporation, and they could not, by resignation, even, which was never done, or by being elected to a new company, divest themselves of the trust already imposed.

These defendants, then, whether directors of the old company or the new, or whether as owners of the real and personal estate association, or as stockholders in the G. & H. J. Co., are trustees of the debtor corporation, and are bound to administer its affairs so as to benefit the creditors of the old corporation.

"A trustee," director of a company in this case, "cannot, directly or indirectly, by himself or through the agency of another, become the purchaser of the trust estate; neither can he purchase an interest in property, and hold it for his own benefit, when, in respect to such property, he has a duty to perform inconsistent with the character of a purchaser on his own account.

"The directors could not have transferred the property of the corporation directly to themselves, or to a corporation of which they were stockholders and directors. That is, they could not act as buyers and sellers in the same transaction, whether they acted in their individual capacity or as directors of two trading corporations. This rule of restriction upon the powers of a trustee invalidates every indirect, as it does every direct, transfer to himself or for his benefit, and the intervention of a third person, as a means by whom the title is transferred from the *cestui que trust* and eventually vested in the trustee, will not uphold the transaction and maintain the latter title."

Abbott v. American Hard Rubber Co., 33 Bar., 578.

The defendants directors are trustees, "co-operating with another corporation in inflicting a wrong, and are directly responsible for the resulting damage."

York & M. D. R. R. Co. v. Winans, 17 Howard, 30, 40.

4. The defendants, whether directors of the old or successor G., H. & H. R. R. Co., or members of the real or personal estate association, or directors or stockholders of the G. & H. J. R. R. Co., are the trustees of the creditors of the old Company.

As such trustees and directors of the old successor

Company — "to put the G., H. & H. Railroad in repair, and to operate it, and to connect it with the Texas Central Railroad, and to make the said G., H. & H. R. R. useful to the public, and yield the defendants an income, "and because said old Company had no credit, they created the real and personal estate association and the G. & H. Junction Railroad Co. to repair and operate the old road and connect it with the Texas Central, by furnishing money out of their own pockets to purchase real estate, rolling stock, and make the connecting road (allowing them, as trustees, their money and interest, to be returned to them, which they have received), they can make no personal profit out of their positions as trustees."

"By carrying on the business" of the railroads, "as trustees or agents, they incurred all the risks and can partake of none of the profits."

Hill, Trustee, 534.

"A trustee will not be permitted to obtain any profit or advantage to himself in managing the concerns of *cestui que trust*, but what benefits or profits are obtained will belong exclusively to the latter. In short, it may be laid down as a general rule that a trustee is bound not to do anything which can place him in a position inconsistent with the interest of the trust, or which may have a tendency to interfere with his duty in discharging it."

1 Story's Equity, §322.
Howard v. R. R. Co., 7 Wallace, 409.

The addition to the G., H. & H. R. R. of depot grounds in Galveston, and the extension of the track by the G. & H. J. Co., with the Texas, were all acts intended to make the old road useful and profitable to the corporation and its creditors — and became parts of it, as such as the rolling stock, purchased and pretended to be loaned to it. This court has held, in Minnesota v. St. Paul Co., 2 Wallace, 609, and Rail Co. v. James, 6 Wallace, 750, that en-

gines and cars, as well as iron, ties, &c., purchased, placed in a railroad become a part of the real estate of the the road. To the same effect are,

Pennock v. Coe, 23 Howard, 117.
Pierce v. Emery, 32 N. H., 484.
Willink v. Morris Canal B. Co., 3 Greene, ch. 377.
Howe v. Freeman, 14 Gray, 566.
Seymour v. Canandagua Co., 25 Barbour, 284.

And being put there by parties, agents and purchasers of the mortgagor, and standing in his place, they are covered by the mortgage.

2 Washburn Real prop., 148.

All the additions to the old railroad, whether in the form of cars, engines, lands or additional road, belong to the mortgaged property and pass with it.

5. The court below held that the defendants, being in the position of mortgagors of real estate, are not to be held accountable for the income of the road.

That it is a general rule that the mortgagor, while in possession, with the consent of the mortgagee, and notice by him, is not liable for rents, need not be denied ; but this is not the case here. The old Company made a specific mortgage of " the tolls, incomes, issues and profits of said railroad, whenever the company should make default in making payment," and after default in interest for three months, authorized the trustees to take possession, receive the rents, and apply them in payment of the interest. This mortgage of the income, independent of the realty, is authorized by law.

Jesup v. Bridge Co., 11 Jura, 572.

The rule does not apply where there is a specific mortgage of the income after default in payment of the interest. It was the duty of the agents of the mortgagors, quite different from the case of an ordinary mortgage, to apply the income in payment of the interest. They have not only violated this duty, but they have undertaken to set up an adverse title and totally defeat the mortgagor's title.

The rule does not apply in this case, because the trustees who were authorized to give notice and take possession were dead, and in such case the persons who intruded themselves into the dead men's estates are bound to account for the whole of the property.

The rule does not apply in this case, because war prevented all intercourse in the enemy's country. The trustees could not go there to take possession. The creditors, even if aliens, could not go there to take possession, and the defendants retained possession, aided in carrying on the war, and refused to give up the property after it. The plaintiffs' trustees were prevented from taking possession by the war, and the plaintiffs have brought swift suit to the first court after the war to recover their property and have an account.

In England, it is the income of the road that alone is mortgaged, and there the courts hold that not only the mortgagor, but his assigns must account for the rents and profits.

Jortin v. South Eastern R. R. Co., 31 Eng. L. R., 320.

The Folkstone Harbor Co. were authorized to mortgage their income; the mortgages were to be indorsed by the clerk of the Company, or to be void. A second mortgagee set up this as a defense, though it had knowledge of the mortgages. The court held, that the second mortgagee and his assignees must account for the rents, and were estopped from setting up the invalidity of the mortgages. Upon the latter question, we might have cited the law of estoppel as to the defendants in this case, in connection with the following cases:

Gordon v. Preston, 1 Watts, 385 I.; and
Brunson v. R. R. Co., 2 Wallace, 283, 311.

The appropriation of the income of the road, to specifically pay the debt, was a lawful act of the old corporation, and by this appropriation the income was exempted from the payment of its general creditors.

G. & C. U R. v. Menzies, 26 Illinois, 121, 148.

# SUPREME COURT U. S.

TERM OF 1870–'71.

No. 212, included in No. 119.

PHILIP C. TUCKER AND ROBERT PULSFORD,
*Appellants,*

*vs.*

N. A. COWDREY, THE GALVESTON, HOUSTON, AND HENDERSON RAILROAD COMPANY, AND OTHERS, *Appellees.*

## ARGUMENT FOR APPELLANTS.

ALBERT PIKE,
ROBERT W. JOHNSON,
*Of Counsel for Appellants.*

# SUPREME COURT OF THE U. S.

PHILIP C. TUCKER AND ROBERT PULSFORD,
*vs.*
COWDREY AND OTHERS, THE GALVESTON, HOUSTON AND HENDERSON RAILROAD COMPANY, and others.

## ARGUMENT FOR TUCKER & PULSFORD.

On the 12th of February, 1869, Cowdrey, Edwin and George Parsons, James and Sherman, filed their bill against the Galveston, Houston and Henderson Railroad Company, the Galveston, Houston and Henderson Railroad Company, (successor of the former,) the Galveston and Houston Junction Railroad Company, Nichols, Briggs, Pierce, Jockusch and others. The bill was brought for the benefit of all persons holding bonds or coupons secured by the mortgages or deeds of trust sought to be foreclosed.

The case made by the bill is this:

The Galveston, Houston and Henderson Company on the the 1st of December, 1853, executed a mortgage or deed of trust to William Kent, of New York, and Moore and Masterman, of London, referred to as the *first* or six per cent. mortgage.

By this mortgage (*Rec.*, 9,) the company, (incorporated February 7, 1853, by the State of Texas, to build a railroad from Galveston to Henderson,) recited that it had determined, in order to raise $750,000, to be applied to the construction and completion of the road, to issue 1,500 bonds, of £100 sterling each, payable in London, on the 1st of December, 1873, with interest at 6 per cent., payable semi-annually in London; and bearing the same date with the deed, (one of

which, payable to William Kent, or holder, at a house in London, is set out in the deed).

Wherefore, to secure payment of principal and interest, the company conveyed to Masterman, Moore and Kent, and their survivors and successors in the trust, the said railroad, constructed and to be constructed from Galveston to Houston, the railways, rails, bridges, fences, privileges, rights and real estate, then owned or that might thereafter be owned by the company in connection with that road, and all the tolls, incomes, issues and profits, and all the franchises of the company, and all the lands used and occupied, or that might be used and occupied for railway stations or depots on the road, and all buildings erected or thereafter to be erected thereon.

To be held by the trustees in trust for all holders of the bonds, subject to the terms and stipulations of the bonds, and the provisions of the act of incorporation; and subject also to the possession, control and management of the Directors of the company, so long as it should comply with the terms, &c., of the bonds and deeds.

And the company covenanted that the proceeds of the bonds should be in good faith applied to constructing and completing the railroad from Galveston to Houston; with covenant for further assurance, to cover the railroad when completed, and the property after-acquired.

On default of the company for three months, to pay either interest or principal when demanded, and on request in writing of any holder of the bonds, the trustees to take possession and to receive the tolls, incomes and profits; and might sell at auction, on reasonable notice, the road and other property, "always with the benefit of franchise," and subject to the conditions thereof; applying the proceeds, after paying expenses and their compensation, to the payment of the bonds. Trustees to fill vacancies, to be selected by the company and survivors, the survivors to act meanwhile.

On the 1st of June, 1855, the company made another conveyance to Kent and Haddock. This, (*Rec.*, 13,) recited the intention to borrow $750,000 more, on bonds payable in New York on the 1st of July, 1865, with interest at 10 per cent., payable semi-annually, (copy of one of which is in the deed.) It recited that the company had instituted a sinking fund from the proceeds of sales of their lands, and reserved the right to pay these bonds after five months' notice. It conveyed the same property as the first deed with like covenants,

and gave the trustees right to take possession upon default of payment of interest or principal for 60 days after demand; with the same powers to receive the tolls, &c., and to sell, and apply the proceeds of sale. The same right of management and control was reserved, and the right to sell the lands acquired under any act of the Legislature of Texas, payment for the same to be made to the trustees.

This conveyance to take the place of the former, and the new bonds only to be issued in lieu of like amounts of the former cancelled, so that this deed should constitute a first lien.

On the 8th of October, 1857, the company made a third deed, to Kent & Haddock. It recites (*Rec.*, 18) the intention to borrow $1,625,000 for the construction and completion of 75 miles of the road, commencing at Galveston, on bonds payable in New York on the 1st of January, 1879, with interest at 8 per cent., payable semi-annually; the bonds, when payable, to bear a premium of 10 per cent., each bond to be for $100. Copy of bond in the deed—stating as security the railroad and the free grant of lands from Texas, 10,240 acres for every mile constructed, and that "the entire property of the railroad and the land as delivered by the State would be vested in trustees" for the benefit of the holders of these bonds.

The deed conveyed the same property as the former deeds, to the distance of 75 miles from Galveston, subject to the same terms, and with the same covenants. The franchises, and all lands granted by the Legislature, in connection with so much of the road, were included, with like power of sale on 60 days' default, and like provisions for taking possession, and receiving tolls, incomes, &c., for that distance, on such default, and for the application of moneys arising therefrom and from sales; same provisions as in second deed as to selling lands.

This conveyance to take the place of the second one; the issue of the new bonds "on the portion of the road from Galveston to Houston" to be at the rate of $35,000 per mile, less $750,000, and no further issue to take place except by cancelling a like amount of the 10 per cent. bonds, until they should be all cancelled, so that the deed should be a full lien on all the property for the whole amount of bonds issued. This not to apply to any portion of the road not covered by the deed that secured the 10 per cent. bonds.

The company "did obtain the money by the sale of the bonds issued under said mortgages or deeds of trust, and the entire railroad from Galveston to Houston, about 52 miles, was built, equipped, and supplied by the money furnished by complainants and others on the bonds."

The company took up part of the 6 per cent. sterling bonds, about £100,000, leaving outstanding bonds to the amount of £50,000, with interest from 1st June, 1855, and interest on the matured coupons.

The company issued all the 10 per cent. bonds, and afterwards paid and cancelled about $50,000, leaving outstanding about $700,000 and interest.

Part of the 8 per cent. bonds were never issued; outstanding, due, and unpaid, about $2,000,000, with interest from 1st July, 1858.

The lands granted to the company amounted to 512,000 acres for the distance finished, from Galveston to Houston, title to which obtained, or the company entitled to receive titles not obtained.

Complainants hold and own £32,000 of the 6 per cent. bonds; $250,000 of the 10 per cents., and a large amount of the 8 per cents.; all with the unpaid interest.

Kent and Haddock are dead; Moore and Masterman neglected to execute the trust, and no successors appointed. The company is insolvent and largely indebted otherwise, and has no agents or officers to carry on its business and operate the road, and has been dispossessed of it and of all the property conveyed.

On the 6th of March, 1860, various of its creditors having obtained judgments against it, on claims subsequent to those of claimants, executions issued, and under them the railroad from Galveston to Houston, 52 miles, was sold, "together with all the right, title, and interest to the franchise, roadbed, track, chartered rights and privileges, and its rolling-stock.

The parties composing the *second* company, successor to the first, got possession of the railroad and rolling-stock, and to defraud the bond-holders and divert the earnings to their own use, formed themselves into a company called The Real and Personal Estate Association, which purchased property and paid for it out of the earnings of the road, which property they allowed the road to use, securing a large compensation in return, and obtained a charter for a railroad

company called the Galveston and Houston Junction Railroad Company, which built a railroad 1¾ mile long, connecting the *first* road, from its terminus at Houston, with the Houston and Central Texas road, which begins at Houston. This was built out of the earnings of the first road.

The Real and Personal Estate Association, the stockholders of the Galveston, Houston and Henderson Road, successor, and those of the Galveston and Houston Junction Road, "represent one and the same interest." They bought rolling-stock out of the earnings of the Galveston, Houston and Henderson Road; and claim that there is no property belonging to *that* company, except its road-bed and charter; all the rest, for working and carrying on the road, belonging to the Association or the Junction Company.

The purchasers under the executions conveyed to the defendants, or some of them. The Junction Company has less than two miles of road. Its capital stock, nominally $500,000, but little or none paid in, and nearly all its property and assets acquired or purchased with the income and earnings of the Galveston, Houston and Henderson Road. The Junction Company works the *whole* road, and receives all earnings, and with them buys property in its own name; and, in equity, all its property and assets are covered by the deeds.

Nichols, Briggs, and others named, composed the *first* company, and they compose its successor, and the Junction Company, and have possession of the road,and have used and appropriated its rents, tolls and income, from 16th of March, 1860, to 1st of February, 1867, to the amount of $3,500,000.

The bill also alleged that the road had been kept in bad condition, rolling-stock and equipments not purchased, everything needed, and its earnings not half what they might be; that the security of the bond-holders was daily diminishing; that the defendants would, unless prevented, sell the whole property, had allowed W. H. Nichols to pervert to his own use $37,000, and allowed Pierce or Pierce & Bacon to sell them supplies and equipments at exorbitant prices; "procured and allowed the premises to be sold for taxes, and purchased it themselves, under the names of Briggs, Ball & Jockush, defendants; that neither the Galveston, Houston and Henderson Company, (successor,) nor the Junction Company, are corporations, but only associations of partnership, with no just claims not subject to those of the holders of the bonds.

Prayed account of tolls and income, and use and occupation, and for a receiver or receivers of *all* the property, rolling-stock, &c., included, with power to keep the road in repair and carry it on; for marshalling of indebtedness, and decree for sale of all the property, and distribution of proceeds among the holders of the bonds.

The motion for a receiver was resisted and supported by affidavits, and on the 23d of February, 1867, the judge appointed a receiver, and directed him to take possession of the roads of the three companies and all their property, real and personal, and choses in action, and of the premises claimed by the Real and Personal Estate Association to have been purchased from the first company, except the real estate purchased and held by it in Galveston and Houston. The receiver to keep in repair and run the railroad, employing all necessary persons, make contracts for supplies and equipments, &c., borrow money, keep accounts, return inventory and appraisements, and audit and adjust accounts.

The Galveston, Houston and Henderson Company, (successor,) the Junction Company, and all the individual defendants, (except Jockush, who disclaimed all interest,) appeared and demurred.

Pierce & Bacon, by petition, showed that they had, from June, 1866, to the end of December, 1866, purchased for and furnished to the Junction Company, a large amount of rolling-stock, material, machinery, supplies, &c., at customary prices and for usual commissions, amounting, on the 23d of February, 1867, to $95,543.02, of which $24,292.26, remained unpaid; that among this property were two locomotives, (named,) tenders, &c., of all which the receiver had taken possession, who was using it and refused to pay their balance of the price, the property so in his hands being worth $75,000; that Pierce & Bacon, (as partners,) were not stockholders in the company, and had no interest in the companies, except as creditors. They prayed payment through the receiver.

The defendants withdrew their demurrers, and answered.

The Galveston, Houston and Henderson Railroad Company [successor] answered, that "the Galveston, Houston and Henderson Railroad Company" was chartered by the Legislature of Texas on the 7th of February, 1853.

Denied that either the deed of 1855 or that of October, 1857 was executed by virtue of any power conferred by the acts of the Legislature, and alleged that those acts did not

authorize the company to execute them, and that they were null and void. Denied that they were so issued as to make them the acts of the company, or as to make the bonds binding on them.

Some bonds were issued, and money obtained on them, under circumstances that make them in equity the bonds of the company; but many are not binding, nor embraced within the security intended by the deeds. Wherefore the company demands proof "to validate and sustain" any bonds produced.

The road was not built, equipped, &c., with money obtained from the complainants and other bondholders. Only a small portion of the money used was derived from the bonds.

Of the 6 per cent. bonds, only £5,700 sterling were in circulation in April, 1858. 848,000 francs of them were unlawfully retained, with 816,200 francs of the 10 per cents. as guarantee for a loan of $100,000. Not more than $70,000 6 per cents. outstanding unpaid.

No attempt is made to state the amount of 10 per cent. bonds outstanding; and that of the 8 per cents. is put at $750,000.

The 6 and 10 per cent. bonds held by complainants are alleged to be those that were never sold, but were unlawfully retained as security; and it is alleged that complainants obtained them for a nominal price.

Denies that the 512,000 acres of land had become the property of the company, or that it was entitled to receive a title to them, and says that they became assets in the hands of the trustees.

Admits the insolvency of the original company, and the sale of its property under executions, and avers that the sale was real and not pretended.

The successor by the same name did, by such sale of the railroad, franchise and rolling stock, obtain possession of it, with information of the existence of the mortgages, and with information that *some* bonds had been issued; but not with a *full* knowledge of the lawful claims of the bond creditors, nor in disregard of them; and they did not conspire to defraud or delay them.

The Real and Personal Estate Company was formed, but not for the purposes alleged in the bill; and neither it nor those composing it purchased property and paid for it out of the earnings of the road. Same as to the Junction Company.

*The same persons compose* the Galveston, Houston and Henderson Company, the Real and Personal Estate Company and the Junction Company; but they do not represent one and the same interest. Each has its separate and independent property, rights and interests. The Junction Company has no rolling-stock purchased with the earnings of the Galveston, Houston and Henderson Company. The latter *has* no property but its road-bed and charter. All the *other* property belongs either to the Association or the Junction Company.

Benjamin F. Terry purchased the railroad, rolling-stock and franchises, obtained possession and transferred the whole to the *present* Galveston, Houston and Henderson Company, formed by Terry and those associated with him.

Denies all the allegations as to the application of the funds of the Galveston, Houston and Henderson road, to the uses of the Junction road; and denies that the assets of the latter are covered by the mortgages. The two companies have not pro rata shared the earnings and profits of the Galveston and Henderson road. On the 12th March, 1860, the original company ceased to exist, by sales under execution, and after that, its unsold assets were administered by trustees designated by law. The new company and the Junction Company are distinct corporations, in law and fact, have always had separate organizations, each acting for itself and its own profit. That stockholders have at times changed, and that none of the individual defendants have used any of the earnings, income, &c., of said road.

The road has been kept in repair and improved, and all the income that it was practicable to use, has been used, with means obtained elsewhere, to supply and furnish it. It needs repairs, but not through neglect or want of diligence. The other allegations of this kind are all denied, as also those in regard to "perversion" of funds, and purchases of Pierce & Bacon at exorbitant prices.

The answer then gives this history of the Galveston, Houston and Henderson Railroad Company:

Soon after the charter was granted, it fell into the hands and under the control of Richard D. Kimball, and his confederates, men of no integrity, whose object was to use the charter and road for their personal profit and advantage. Kimball, as President, and the Secretary and Treasurer, resided in New York, and kept the offices and records there. The records have never come to the possession of the pres-

ent company, nor been taken to Texas. Shares of the capital stock were issued to a large amount, but little was paid on account of the shares, and they were for the most part issued without legal consideration, and in violation of the charter.

The first bonds issued were placed in the hands of agents in Europe, for negotiation and sale, and few of them were issued to bonâ fide buyers; little of the funds realized from them was employed in the construction of the road, or purchase of materials, and nearly the whole was used by Kimball and other officials and agents, for salaries, expenses, and payment of unjust claims.

Previous to April, 1858, all of these bonds were retired, except a small amount, and £32,000 sterling deposited with a bank in London, as collateral security for $100,000 loaned to some one who pretended to act as agent for the company. Before that date, $154,000 10 per cent. bonds were deposited in lieu of them, and they were released from the hypothecation, and held subject to the order of the company. These 6 per cents, it is believed, are the same bonds of which complainants claim to be owners and holders, who obtained them in confederacy and joint interest with Kimball, and at a nominal price, with knowledge of the facts, and for a fraudulent purpose.

Only a small amount of the 10 per cent bonds could lawfully have been issued, and if the complainants hold $250,000 of them, they obtained them fraudulently, and for a small consideration. No money derived from the 10 per cent bonds, it is believed, was ever applied to build the railroad or purchase materials.

The whole road was not built, equipped and supplied with moneys procured under the mortgages. The first section, of 25 miles, commencing at Virginia Point, and extending towards Harrisburg, was completed by the 1st of May, 1857, as the law required, and the money expended in building it was not obtained by means of bonds; but in November or December, 1856, Kimball obtained a loan of a million francs in France, to enable the company to finish that section, to which, and the purchase of materials, part of it was applied, leaving the company largely in debt to various persons. This loan was obtained upon the credit of the lands to which the company would be entitled on completing the section, and on Kimball's assurances of earnings.

The second section, extending to Harrisburg, 15 miles, was required by law to be completed on the 1st of November, 1857. Kimball obtained a loan in Paris, in June, 1857, of $300,000 to enable him to complete it, upon the credit created by the completion of the first section. This also was not obtained on bonds, but on the same security as the first loan. Only $25,000 of it was used on the road, and it was not completed by the prescribed time; and the company would have been dissolved, but for the intervention of the defendants and other citizens of Galveston and other places, who obtained from the Legislature an extension of twelve months, and advanced money and credit. On the completion of this section, the company was largely indebted.

The railroad bridge across Galveston Bay, from Virginia Point to Galveston Island, was built by the City of Galveston, and its use conceded by the city to the company on certain terms, the city retaining the ownership.

The section of the railroad extending from the bridge to the city was built with funds obtained by a loan from *Robert Pulsford*, amounting to about $50,000, and a contribution by the defendants and other citizens of Galveston, of $30,000.

The section from Harrisburg to Houston was built by Kyle & Terry, under contract with the company, and for the most part, if not entirely, on credit; the contractors holding the section, when completed, in their own hands as security, which right of possession the company conceded.

The 8 per cent. bonds were issued to complete the first seventy-five miles of the road, and redeem the outstanding 10 per cent. bonds. Of 26,250, about 13,000 were deposited with agents in Europe for sale. Part of these were used in redeeming 6 and 10 per cent. bonds, some returned to the company, undisposed of, some sold in Europe by agents, for money, and others retained by the agents to reimburse them for loans and advances made to Kimball, and for other amounts advanced, for which he never accounted to the company.

These statements as to the loans and amounts of bonds, &c., are made on information, and it is charged that Kimball applied to his own use and that of his confederates most of the moneys received on the bonds, and is a confederate of the complainants, using their names in the suit, and the party mainly to be benefited by it.

In March, 1869, the company was largely indebted to Kyle & Terry, Pulsford, and others, who had obtained judgments in the District Courts of Galveston and Harris Counties, amounting in the aggregate to about $228,000. Upon executions under these judgments, the railroad, rolling-stock and *franchises* were sold at sheriff's sale, on the 13th of March, 1860, and Benjamin F. Terry became the purchaser, for $28,000; besides which there were the full amount of the judgments, $228,000; a floating debt estimated at $60,000; the debt created by the city for building the bridge, $100,000, and $100,000 due Pulsford; all which, the purchaser and those afterwards associated with him, were equitably and justly bound to pay.

Terry associated divers persons with him, *and they became a corporation*, "*under and by virtue of the said charter*, and thereby, in name, in fact, and in law, became and were, from the date of said organization, the Galveston, Houston and Henderson Railroad Company, with the powers, privileges, and duties prescribed in said charter, and owners of the road-bed, rolling-stock and franchises of the said original company," which so ceased to exist.

This new company admits the justice and equity of said debts, has settled some of them, and will settle all.

It is claimed that the liens of the judgment creditors were paramount to those of the complainants, and that the new company is subrogated to those liens. The price paid is alleged to have been as much as the road was worth; which is described as badly built, on illy selected ground. $500,000 would build and equip such a road. The rolling-stock consisted of two locomotives and tenders, one second-class passenger car, one hand-car, and fourteen freight-cars. The road, apart from the franchise, and including the bridge, was not worth more than $250,000. The purchase was made in good faith, and for more than its value, with the intention to deal justly and fairly with all who might have claims against the road; and most of the purchasers were citizens of Galveston, and others, engaged in business, who had an interest in having the road completed, it having been abandoned by the bond-holders and mortgagees.

The purchasers found the road in miserable condition, too dilapidated for use, the rolling-stock insufficient and inferior, and its earnings would not pay expenses; and in consequence of the debts, the new company could not borrow

money, and those who composed it were not willing to invest their means in the road, and so make themselves liable for the bonds and mortgages.

For the purpose of raising funds to repair and run the road, the stockholders, or part of them, formed the Real and Personal Estate Association, appointing as trustees of it three persons named, subscribed $194,500, and paid 85 per cent. of it in gold, of their private means, not derived from the new railroad company, nor from the road, the investment not being in stock or property of the Railroad company, but wholly distinct from it. With these funds the Association bought real estate in Galveston and, rolling-stock, &c., and leased the property, thus purchased, to the railroad company, and loaned it money, and so enabled it to operate and improve the railroad. It was being improved, and doing well, until the war, though the necessary outlay exceeded the earnings. Soon after the war began, the Confederate authorities took possession of the road and stock, and kept it during the war; and though the company could carry passengers and freight, it had to receive Confederate money, at rates prescribed by the authorities, a large amount of which was on hand at the end of the war, and a total loss.

After the war, the company repaired the road, put it in running order, &c., and in that expended all its earnings, except a sum on hand when the suit was brought, which was to have been paid *pro rata* to the creditors, by order of the Directors; but this the suit prevented.

The road enters Houston on the south side of the city, and was to cross Buffalo Bayou on the north and west side, and be continued to Henderson; but the extension was abandoned for want of means; and it became important to connect with the Houston and Texas Central, on the North side of Buffalo Bayou, and the Junction Company was incorporated to build this connecting road. The answer of that company is adopted by the Galveston, Houston and Henderson Company.

The company has always desired that all just claims should be paid. In 1861 it offered to surrender the road to the bond-holders, with all the property acquired by them in connection with it, on being reimbursed its actual costs, expenses and advancements; and it offers to do so now.

The answer of the Junction Company, (*Rec.*, 87,) denies that any of the funds used in building the Junction Road, or

buying rolling stock for it, were derived from the earnings of the other road, except so far as they were justly and equitably due and paid to it. It is true that the stockholders of the two Companies, and of the Association are the same, but the interests of each, legal and equitable, are distinct and separate. The Galveston, Houston and Henderson Road has no legal or equitable right or claim to any of the property of the Junction Road, in the hands of the Receiver. All the allegations of the bill as to the receipt and use by the Junction Company of earnings of the other, or of the application of such earnings to its benefit, are denied, with all other allegations made against the Junction Company.

The Galveston and Houston Junction Company was organized under the Act of the Legislature of 8th April, 1861, on the 13th of that month. The President and officers were elected on the 17th of July, 1861, and the corporation has existed and acted ever since. The act of incorporation was procured on account of the embarrassed condition of the other company, and because the funds to build the Junction Road could not otherwise be obtained, and the connection was important to Galveston, and the Galveston and Houston Company. The work was undertaken during the war, the citizens of Houston being opposed to it, and no iron or materials in the State.

The Junction Company purchased of the Houston, Trinity and Tyler Road, a quantity of iron, for $19,231.85, coin, for which it gave its note, dated May 25, 1863, bearing ten per cent. interest, and also ten flat and two box-cars, for $12,000, coin, for which it gave its note, July 1, 1863, with interest at ten per cent., both payable six months after the opening of the port of Galveston to foreign commerce, and secured by a deed of trust of the road, franchises, and all property of the Junction Company.

The cost of the road is stated at about $65,700. The rolling-stock, when purchased, was hired by the Galveston, Houston and Henderson Company, at $600 a month, until January, 1865, which hire was paid in Confederate money.

About the 1st of May, 1865, the Association sold to the Junction Company all the rolling-stock, tools, and machinery owned by it, and then hired to and used by the Galveston, Houston and Henderson Company, for which the Junction Company gave three notes of $29,113.33⅓ each, with interest at ten per cent., payable at 6, 12, and 18 months, to secure

which a deed of trust was to be, but was *not*, given. This property continued hired to the Galveston, Houston and Henderson Road until this suit was brought. The Association also loaned the Junction Company, prior to January 1st, 1866, for the purchase of rolling-stock, machinery, tools, &c., $55,410.36, and about March 26, 1866, $43,214.84, for which the Junction Company gave its notes. These funds were used in purchasing rolling-stock, &c., which was hired to the Galveston, Houston and Henderson Company, until this suit was brought, and then went into the hands of the Receiver. And in purchasing such rolling-stock, the Junction Company also incurred a debt of $23,933.24 to Pierce and Bacon, of Boston, which is still unpaid. The liabilities of the Junction Road amount, in all, to $241,-109.29, besides interest; of which $118,551.85 is due in coin.

Thus the Galveston and Houston Road has been repaired, improved, and almost entirely rebuilt, each company preserving a distinct right to its distinct and independent capital and means, and earnings and proceeds; and all the earnings, tolls, income, profits and revenue, of all the property of the two companies and of the Association have been used to maintain the railroad, and to procure rolling-stock, &c., to be hired to the Galveston, Houston and Henderson Company. For the use of the Junction Road and hire of stock, &c., that road owes the Junction road $195,412.29, and interest; the former hiring the road of the Junction Company, the bridge across Buffalo and White Oak Bayous, and all the rolling-stock, machinery, &c., at $8,000 a month.

By the charter (*Rec.*, 94) the capital stock of the company was fixed at $150,000, increased by act of February 15, 1863, to $500,000, which revived and continued in force the original act, and authorized the company to lease the road, stock, &c., to any other company, (*Rec.*, 94).

The individual Defendants, denying all the allegations of the bill that imputed fraud, or use of the funds and earnings of the Galveston, Houston and Henderson Road, exhibited the articles of association of the Real and Personal Estate Association, (*Rec.*, 95, 99,) by which they and others united as co-partners "in the purchase and sale of real estate and rolling-stock for railroad purposes, and other personal estate, loaning money on interest," &c., &c.,—the money to be invested to be so much as might be subscribed. Ball, Jockush and Gilbert were made trustees, authorized to rent, hire

and lease any property acquired by the Association, and to make such purchases as the partners might direct. These articles were signed on the 23d of March, 1860, and subscriptions made to the amount of $186,700, to secure which, all property to be acquired was hypothecated to the trustees, who were authorized to make assessments to meet payments on purchases, and to sell the interest of any partner failing to pay.

The capital stock consisted of 1,945 shares of $100 each. The stockholders paid in 85 per cent. in gold. Thirty-six thousand dollars of this was loaned to the Galveston, Houston and Henderson Company, to put the road in operation, and ten per cent. of the amount of the judgment debts of the company, which was paid on the judgments. The residue was invested in buying real estate, and improving it, and rolling-stock, machinery and tools and other personalty, which was so purchased with private means, because the company had neither income nor credit; and the whole was leased to the company—the real estate, with depôts and appurtenances, to October 1, 1865, at $666.66⅔ a month, and thence to March 1, 1867, at $1,200 a month; the rolling-stock, &c., to July 1, 1864, at $3,250 a month, and thence to May 1, 1865, at $4,333.33⅓ a month. On the 1st of May, 1865, the rolling-stock, machinery, tools, &c., were sold to the Junction Company for $87,340, for which that corporation gave its notes.

The Galveston, Houston and Henderson Company paid the accruing rents, except $33,490.97, which is still due, with interest.

On the 1st of January, by means of the income from this hire, the Association loaned the Junction Comppny $55,-410.36, at ten per cent., and on the 29th March, 1866, $43,-211.84 at 12 per cent., and took its notes, which are unpaid. The Galveston, Houston and Henderson Company repaid $36,000 in Confederate money, nearly all worthless, which was divided among the stockholders. The rents, during the war, were paid in the same.

The organizations are averred to be entirely distinct, and is denied that the Defendants ever received anything belonging to the Galveston, Houston and Henderson Company, except as before stated. There is no community of interest, joint ownership, tenancy in common, partnership or secret trust, between the companies, or either of them, and the Association.

On the 31st of May, 1867, Philip C. Tucker of Galveston, and Robert Pulsford, of London, filed their petition, stating that they were interested in the subject-matter of the suit; that the former was trustee and the latter beneficiary in a deed of trust made by the Galveston, Houston and Henderson Company, (which was exhibited with the petition,) on the 21st of May, 1859, and another on the 28th of July, 1859, then acknowledged and recorded, by which they acquired certain rights in the property in controversy, *i. e.*, among other rights, to the possession of it, and of the rents, issues, profits and earnings; that their debt was unpaid, and they were necessary parties, and praying leave to answer and file a cross-bill.

The deed of 21st May was made at London, between the Galveston, Houston and Henderson Railroad Company, by Kimball, President, and Tipton Walker, Secretary and a Director, acting for the company, and Robert Pulsford.

It recited, that in April, 1858, Pulsford lent Count d'Alton Shee, or the European Committee of the road, for the company, £5,000 sterling, payment whereof with interest at 8 per cent. was secured by a deposit of 500 bonds of the company, of the 8 per cent. issue of £20 each; that in October, 1858, he lent the same agent or committee for the company, £4,000 sterling, payment with 8 per cent. interest secured by a charge on the same bonds, and a deposit of and charge on 420 other 8 per cent. bonds of the company, and by deposit of a bill of lading of about 497 tons of iron rails, shipped on the Mimi from Cardiff, and then lying in the custom-house at Galveston; and that there was then due to Pulsford £9,686.

That the company needed more means to enable them to complete the road, then finished and ready from Virginia Point to Houston, 43 miles; and it was important that four miles of the line from Galveston Island to the terminus of the bridge then building between Galveston Island and Virginia Point, should be completed, so as to form a junction between Virginia Point and the City of Galveston, and other works be carried out, so as to make a clear and continuous line between Galveston and Houston, 53 miles; to effect which the company had applied to Pulsford for a further loan of £10,000 sterling, to be applied: 1st, in paying certain judgment debts against the company, in the District Court of Galveston County, amounting to $10,245.66; 2d,

in paying freight and charges on the 497 tons of rails; 3d, in completing the railroad, as stated above.

Pulsford agreed to loan this additional amount, to be secured as after stated.

The company covenanted to secure the whole; to purchase the judgment debts, with so much of the new loan, and assign them to Pulsford or a trustee for him, so as fully to vest them in him or his trustee; that the residue of the £10,000 should be paid over to Jacob L. Briggs, Vice President of the company, and Nabor B. Yard, its Treasurer, to their joint account, upon execution and delivery to Pulsford, his trustee or nominee, of a valid bond or obligation, to be approved by him, his solicitor or agent, for the due application of the residue of the sum to the completion of the road between Virginia Point and Galveston, and to ensure the completion of the continuous line between Galveston and Houston; that prior to such payment, the company should give Pulsford a judgment, for the £10,000 on the residue after purchase of the judgments, with interest at 8 per cent., payable half-yearly, to rank next to the judgments so to be assigned, and to be payable 12 months after date, with stay of execution for 12 months from date, on it and the assigned judgments; that the company should give him a mortgage, assigment or charge, subjecting and charging the lands and property of the company, real and personal, and the accruing receipts for traffic on the road, to the extent of forty per cent. on the gross receipts of the whole length of road to end with payment to him of the whole amount due him, with interest: that the other 60 per cent. of gross receipts should be applied to paying current and working expenses of the line; that after full payment, Pulsford should execute, release and give up all documents and securities; that he should forward the bill of lading for the iron to his agent at Galveston, and permit the company to lay down the rails, they securing to him the possession (by way of security only) of the rails, after they should be laid down, until full payment of his debt.

Also, that, as a compensation to him for his assistance, the company should transfer and convey to him one fourth part of the property, interest and privileges, which it possessed under certain agreements between the President of the Buffalo Bayou, Brazos and Colorado Railroad Company and the President of the Galveston, Houston and Henderson Com-

pany, in reference to the town of Harrisburg, and the property thereby agreed to be transferred to the latter company, subject to the reservations contained in the agreements, and excepting so much of the property as should be necessary for a station at Harrisburg, and machine shops.

Also, that it had been agreed, that the company would, if Pulsford concluded to do so within a year, enter into an agreement with him, permitting him to lay down a line or lines of rail or track, from the terminus of their road [to a] wharf or merchandise station, [to be built by him,] to which all goods intended for transportation on the railroad should be sent, and the company should deliver all goods for export there, but pay no rent or charge for the use of the wharf and station, Pulsford charging the shippers or owners of the goods.

The agreement should continue twenty-one years, and the company be bound to grant no like privilege to any one, nor to make, erect or use any other wharf.

That all bonds and securities held by him were confirmed and acknowledged.

That he might, at any time within 12 months from date, take absolutely the bonds held by him, at 50 per cent. below par.

That Kimball and Tipton should endeavor to obtain from the company other 8 per cent. bonds, to the amount of £20,000, and hand them to Pulsford, as additional security.

That all necessary further assurance should be given and executed, before payment of the £10,000, and no existing securities of Pulsford should be prejudiced, or his rights or remedies affected; that Pulsford should not be bound to advance the money until fully secured; and the company should enter into covenants fully to secure him, as should every person claiming any estate, right, title or interest at law or in equity, by, from, through, under, or in trust for the company; with renewed covenant for further assurances.

That the company's ratification should be a condition precedent, on failure whereof all to be void. (*Rec.*, 111 *to* 117.)

On the 23d of July, 1859, (*Rec.*, 117,) at a meeting of the Directors at Galveston, this contract and deed was ratified, and the attorney of the company directed to confess judgment in favor of Pulsford, for $38,217.98; the possession

and title of Pulsford of and to eight hundred and eight 8 per cent. bonds, of $100 each, and fifty 6 per cent. bonds, of £100 each, of the company (numbers of the bonds given in the entry of ratification,) were admitted; and the proper officers were directed to carry out the provisions of the deed.

On the 28th of July, 1859, the company, by its Secretary and Vice President, executed deed, by which it acknowledged indebtedness to Pulsford in the sum of £19,686 sterling, or $95,280.24, federal currency, with interest at 8 per cent. from 21st May, 1859, as acknowledged and agreed on by the deed of that date, executed and approved as aforesaid; that the company thereby agreed to convey the one-fourth of the property in Harrisburg, but could not make perfect title, and desired time, which Pulsford agreed to give, on condition, that if such conveyance should not be made within a year, the company should forfeit and pay him the further sum of £5,000 sterling, ($24,200 federal currency.)

And, to comply with the deed and agreement, the company conveyed to Philip C. Tucker the railway constructed and to be constructed from Galveston to Houston, with the road-bed, railway tracks, ties, rails, bridges, fences, and privileges, including the franchise of the company, all its real estate then owned by it or thereafter to be owned in connection with the road, all lands that might belong to it under Acts of the Legislature of Texas, the tolls, incomes, issues, profits, or other receipts from the business or traffic of the company on its road, all station-houses, depôts, warehouses, machine shops and other shops, sheds or buildings, and land adjoining, used or occupied by or belonging to the company, in connection with the buildings, and all buildings thereafter to be erected on the property of the company, all the engines, cars, trucks or other rolling-stock used on the road, intending to include *all* its property, real, personal or mixed, wherever situated, in Texas: To have and to hold in trust.

The company covenanted that it would proceed immediately to complete the continuous construction of the road, from Galveston to Houston, and put it in good order, and place running stock on it; that monthly statements of its earnings should be made up, after its completion, and delivered to Pulsford or his agent, 40 per cent. of the earnings paid him on the first of each month, and the residue applied

to carrying on the road; and that within a year it would convey the property in Harrisburg, according to the deed. In case of any default, the trustee to take possession of all the property conveyed, carry on the road, and pay Pulsford's debt, and then return the property to the company; or he might sell it after certain notice, to the best bidder, and convey title, pay expenses, costs, counsel fees, his own compensation, the debt to Pulsford, and damages in lieu of the Harrisburg property.

This was duly proven, and the whole (the original deed included) duly recorded, on the 13th of August, 1859.

On the 6th of June, 1867, by leave, the answer of Tucker and Pulsford was filed.

They denied that the prior mortgages attached to any part of the road, road-bed or other structure, until it was actually constructed and paid for.

They denied that any considerable portion of the road was built with money obtained under said mortgages, and allege that portions were constructed with other moneys furnished by other persons, equally entitled to a lien.

They set out and exhibit the contract made with Pulsford, the payment to Briggs and Yard of the money which he agreed to loan ($48,500,) to be applied to building the road between 33d street in Galveston, and Virginia Point, and the deed of conveyance in trust to Tucker. The money was so expended, and the 497 tons of rails were laid down on that part of the road.

They admit the sale under execution, and the purchase by Terry; and say that the Sheriff and purchaser were notified, at the sale, of the liens and claims of Pulsford, that he claimed a first lien on the portion of the road built with his money, and the right to 40 per cent. of the earnings, that the company had failed to pay this, and the interest due him was unpaid.

They say that they know nothing about the Junction Company and Association, and that no account of the earnings was ever furnished them; know nothing as to the condition and equipment of the road, nor of any fraud; and say that the sale was made in good faith and according to law, and Terry bought subject to the said liens and equities.

On the 8th of June, 1867, Tucker and Pulsford asked an order for the payment to them of 40 per cent. of the earnings of the road. (*Rec.*, 131.)

On the 10th of June, 1867, they filed their cross-bill, making all the parties to the original bill, defendants. (*Rec.*, 131.)

Its allegations are, that the portion of the road from the bridge over Galveston bay to [33d] street in Galveston was not constructed with any money obtained by the sale of bonds, but that in 1859 the company had no money to build it with, no railway had been constructed on the island between these points, *no land, no right of way on the same had been located, purchased, nor taken in any way* [*or*] *lawfully acquired by the company, for the construction of the road, o the same*, up to the 13th of August, 1859, and the railroad had no existence thereon, in law or fact; that for this reason, and to make the road from Virginia Point to Harrisburg of some value, by connecting it with the seaport of Galveston, without which it was a failure, the company applied to Pulsford for funds wherewith to build it, and he did advance, in coin, for that purpose, £10,000 sterling, and the contract of 21st May, 1859, was executed, ratified and confirmed, and the deed of trust made on the 28th of July. These are made part of the cross-bill, and the substance of them stated. That the money so obtained was so expended, the rails and other material paid for out of it and with a part of the first loan of Pulsford; and Pulsford has in equity a lien paramount to all others, on that part of the road. That little has been paid Pulsford, and the new company took and has possession and has received the earnings, paying nothing over in accordance with the contract and deed. That there is due Pulsford about $131,000; the Galveston, Houston and Henderson Road should account for the earnings, and the Junction Road as to any of these or property purchased with them now in its possession, and the money or property be paid or delivered to Tucker for Pulsford.

So prayed answer, and such account, and payment of 40 per cent. of the earnings, establishment of Pulsford's paramount lien on this part of the road on the island, and decree that Tucker sell under the deed of trust, and that he be allowed to execute his trust, and have possession, foreclosure and general relief.

A schedule of the judgments under which "the roadbed, track, franchise and chartered powers and privileges" of the company were sold, is exhibited with the answer of William R. Smith, who was President of the company at the time; and who alleges that the sale was impossible to be

prevented, owing to the miserable condition of the company. (*Rec.*, 139.) They amounted to over $115,000. The sheriff sold, on the 6th of March, 1860, on writs of venditioni exponas, after the advertisement, the road-bed, track, franchise, chartered rights and privileges of the road, two locomotives, fourteen platform cars, one second class passenger-car, and one hand-car. Terry was the purchaser, for $28,000, and the sheriff conveyed the property to him on the 7th of March, 1860. (*Rec.*, 139.)

A schedule of the property received by Receiver Walker is at pp. 142 to 149. The total value is estimated at $244,669.69.

In June, 1867, (*Rec.*, 153,) the Receiver was authorized to purchase sites for depôts, erect buildings, and end his arrangements with the Real and Personal Estate Association, and to have completed the surveys of the lands belonging to the company under the grants from the State.

Replications were filed to the answers, and the bill taken as confessed against the *original* Galveston, Houston and Henderson Company. (*Rec.*, 158 to 160.)

On the 12th of November, 1867, the Receiver was authorized to rebuild the bridge connecting the Island of Galveston with the mainland (it having been destroyed by a storm,) and to borrow money wherewith to do it, the same to be a lien on all the rents, tolls and income, the City of Galveston ceding all rights to the bridge. (*Rec.*, 161.)

In December, 1867, the complainants answered the cross-bill of Tucker and Pulsford. (*Rec.*, 163.)

They denied the jurisdiction of the Court of the matters set up in the cross-bill and the propriety of its exhibition.

They admit, with some special pleading amounting to nothing, the loan by Pulsford and his advance of money and rails; that these rails were laid down on the track of the road, most of them on that part between the City of Galveston and Virginia Point; and allege that the iron so laid down became part of the realty and subject to the original mortgages. They do not deny the contract with Pulsford, as exhibited, nor the deed of trust to Tucker, but say that Pulsford thereby and by delivering the money and iron, released any special lien on the iron, and on any particular part of the track, and accepted in lieu of it the other securities given by the deed.

They admit the previous loans by Pulsford, to secure

which he held the bonds, which, under certain circumstances, he was to accept in payment at a fixed price; and claim that his *extortion* of further security was a *fraud* on the rights of his co-bondholders; and claim that this additional security shall inure to the benefit of all. They allege payments to Pulsford, and demand an account. And they deny any paramount claim of Pulsford, and assert the right of the bondholders to all the accruing income and profits of the road; and allege combination between Tucker and the companies, &c., to resist the just claims of the bondholders and sustain the forced sale of the road.

On the 2d of January, 1868, Tucker and Pulsford amended their answer, and denied that either of the three mortgages set up in the bill was executed in conformity to law or by authority of law, the pretended corporate action purporting to authorize them, having been done and had by the company, through its pretended directory, beyond the limits of the State of Texas, to wit, in New York; and that the first and third were not signed by the trustees named in them, and these never accepted the trusts. (*Rec.*, 174.)

On the 1st of February, 1868, Tucker and Pulsford replied to the answer to their cross-bill. (*Rec.*, 214.)

The cause came on for hearing on the 20th of May, 1868, and the hearing was continued until the 27th. On the 20th of May, the defendants moved to dismiss the bill, or not to proceed to a final hearing and decree:

1st. Because neither Kent nor Haddock, (trustees in two of the deeds made by the company,) nor the heirs or legal representatives of either of them, were parties.

2d. Because no holder or representative of the legal title to the property was before the court, to enable it to decree.

3d. Because the holders of the 10 per cent. and 8 per cent. bonds were not before the court or properly represented, the complainants having adverse interest.

4th. Because neither the original Galveston, Houston and Henderson Railroad Company, nor any officer or representative of it was before the court.

5th. Because the Houston, Trinity and Tyler Railroad Company, vendor to the Junction Company of a large amount of the property in possession of the Receiver, and a mortgagee of the same, and of the Junction Road, was a necessary party.

6th. Because the bill prayed an account of the amounts

of tolls, profits and income of the Galveston, Houston and Henderson Road, received by the members of the Real and Personal Estate Association; and several persons [named,] who were members of that Association, and received part of these moneys, if any were received, were necessary parties. In this motion, Tucker and Pulsford did not unite. (Rec., 247). The consideration of it was postponed to the final hearing.

On the 27th of May (*Rec.*, 248), the complainants filed a motion, referring to the statement in the answer of the Galveston, Houston and Henderson Railroad Company, "and this defendant now again repeats its entire willingness, and that of those interested in said roads, to surrender said road and all the property which is held in connection therewith, upon receiving reimbursement for actual cash advances, and such equitable compensation as is just and reasonable;" and, as the other defendants had adopted this answer, complainants accepted the proposition, submitting it to the court to determine the amount due the defendants for actual cash advances and equitable compensation, and to decree accordingly.

On the 11th of July, 1868, the court decreed as follows:

It found that the Galveston, Houston and Henderson Railroad Company, issued the three series of bonds; and that there were then outstanding of the 6 per cent. bonds, 496, amounting to £49,600 sterling, and unpaid coupons amounting to £41,664 sterling; of the 10 per cent. bonds, $750,000 principal, and unpaid coupons amounting to $675,000; and of the 6 per cent. bonds, $1,900,000 principal, and unpaid coupons amounting to $1,292,000. The sterling money due was stated to be equal to $793,994 lawful money, [legal tender currency, at $6.72 to the pound sterling].

That the complainants held, of the 6 per cents., to the amount of £64,458 sterling; of the 10 per cents. $429,670; and of the 8 per cents. $37,456.

That the original company was indebted to Pulsford in the sum of $15,508.39, with interest on $41,570.80, from March 12, 1863, being the balance due him on his judgment, making in the aggregate $32,745.26.

That the three mortgages were duly executed by the original company, to secure the bonds, as stated in the bill, and the mortgage and deed of trust to secure Pulsford; "which said mortgages and deeds of trust were duly recorded, and

take precedence in order of their date." That Kent and Haddock were dead, and there were no trustees acting under the deeds of trust; the original company had failed to pay the said amounts, due on the bonds and to Pulsford, and the successor company and other defendants had also failed to do so, so that the mortgages ought to be foreclosed and the property sold.

That sale of all the property after mentioned, except the land scrip, was made by the Sheriff of Galveston county to B. F. Terry, on the 6th of March, 1860, which was valid and regular, but did not affect the rights conferred by the mortgages and deeds of trust; that the successor or second Galveston, Houston and Henderson Company continued in possession of all the property, except the land scrip, until the appointment of the Receiver; and that the defendants composing that company, the Junction Company and the Association, took possession of the property, and had retained it, with full notice of the mortgages and deeds of trust, and after default of payment of interest on the bonds, and had so remained in possession without the consent of the bondholders or of the complainants, and were thereby bound in equity to account to the bondholders for the rents, issues and profits produced by a rent of the property or the use of it, received by them, from the time when they went into possession.

That the Receiver was in possession of 800 land certificates, the property of the original company, not sold or conveyed to the successor company, and claimed only by the original company.

And that the property was still subject to the mortgages and deeds of trust, notwithstanding the defences set up by the defendants, and by Pulsford as intervenor.

Therefore it was decided that if the defendant should not pay, within two months, the sum of $5.443,749, lawful money of the United States, the equity of redemption should be barred and foreclosure had, of the following property: all the railroad built by the original company, from Galveston to Houston (not including the bridge across West Galveston Bay from Eagle Grove to Virginia Point, or the Junction railroad), with all the railways, rails, bridges, fences, privileges, rights and real estate, owned at any time by the original company, in connection with the railroad; and all the tolls, incomes, issues and profits thereof, and all the

franchises of the company, and all lands at any time before March 6, 1860, used and occupied for depôts and stations on the road, and all buildings erected thereon, and 512,000 acres of land unlocated, represented by 800 land certificates or warrants in the hands of the Receiver, and the engines, tenders and cars belonging to the original company, and placed and used on the road.

But direction for sale was withheld until final decree, reference to a master being necessary.

And a master and auditors were appointed to examine the accounts of the companies and Association, and to report as to the building of the Junction Road, &c.: and the question of the liability of this Junction Road and of the property claimed by it was reserved. The rights of bondholders not parties, to appear *pro interesse suo*, were reserved.

Among the testimony in the case is that of William R. Smith, in reply to interrogatories of Tucker and Pulsford. (*Rec.* 595.)

He was President of the road from August, 1859, to March 6, 1860.

From January 1, 1859, to August, the company was notoriously bankrupt, without money or credit, the local creditors clamorous for their pay. The road then ended in the prairies. About August, 1859, a new Board of Directors was elected, and new officers. The object of the change was to insure the faithful expenditure of the money advanced by Pulsford, to build the road from the city, on Galveston Island, and to the end of the bridge over the bay, without which connection the road could do no business. The railroad had then been extended to an uninhabited locality, within three miles of Harrisburg, near Sims' Bayou. Several bayoux and forest lands were between the end of it and Harrisburg. Houston was eight miles distant, at the Virginia Point, and there was no house within a mile. The nearest point of Galveston Island was about two miles from this terminus, the bay intervening; and the city lay seven miles further east; the only communication across the bay being a sail-boat, there being neither ford nor bridge.

No part of the road on the island, or between these points, was then constructed, *no attempt had even been made to locate the line* or construct the road, and the company had neither money nor credit with which to build it. In August, 1859, the land on that part of the line had not been condemned or

purchased. The company took possession of it in September, 1859, and the road over it was built between 1st September, 1859, and 1st February, 1860, with the money obtained from Pulsford, which was faithfully applied to that purpose. The rails were those that were on the Mimi, and the property of Pulsford. On the 23d of July, 1859, the iron was in the bonded warehouse at Galveston, and Pulsford, by his agent, had the bill of lading and claimed to own the iron. It was afterwards laid down on the road between Thirty-third street and Virginia Point.

Nichols testified (*Rec.*, 777) that in the summer of 1859, E. A. Nichols & Co. received, at Galveston, the contract between the Galveston, Houston and Henderson Railroad Company, and Pulsford, and ten thousand pounds, to be held until notified by Pulsford's attorneys that the contract had been confirmed and its conditions complied with. They received also a bill of lading for the four hundred and ninety-seven tons of rails, which belonged to Pulsford. These also were held subject to the order of his attorneys. There were two thousand seven hundred and ninety-four bars. When advised that the contract had been fully complied with by the company, they delivered the money and the iron, and the company received both, with full knowledge of the claim, right and interest of Pulsford. The money was expended in building the road from Galveston to the island terminus of the bridge over the bay, and the iron was laid on the same piece of road, and on the bridge.

Briggs testified to the same effect as Smith as to the condition of the company and road, in 1859, previous to August of that year. (*Rec.*, 778—the interrogatories being at p. 593.) No road was then built, nor had there even been an attempt to establish one between the city and Point. From the end of the road to the nearest point on Galveston island was two miles, and from that to the inhabited portion of the city, five more. Previous to August, 1859, no route had been established nor land condemned, for the use of the road, on the island. The line was fixed, after a contest, in August. The land never had been condemned or purchased. It was simply taken possession of without objection on the part of the owners, in September. The road over the island was begun on the 1st of September, and finished on the 1st of February, 1860; and it was built with the money obtained from Pulsford, which was faithfully expended, and found

a supplemental cross-bill, for reasons stated. But the hearing of the case had commenced on the 16th, and was continued until the 19th, when the court rendered its decree. (*Rec.*, 1010, 1011.)

The decree of 1868 was re-affirmed and made again, as to the matters therein determined, and as to the foreclosure, in favor of the complainants, and others in like interest, of the equity of redemption on the railroad, (not *including* the bridge across the bay, or the Junction railroad,) and all other property specified in that decree, correcting only a clerical mistake as to the amount due by reason of the 6 per cent. bonds; and sale of the property was directed, so much of the price bid to be paid into court as should suffice to satisfy the cash demands, the residue payable in bonds of the road; having reference to their priorities as stated in the former decree, in such proportion to the par value of the bonds and overdue coupons as the amount of such remainder of such bid should bear to the same series of bonds and overdue coupons then outstanding. To ascertain which proportion, &c., holders of bonds and coupons were required to present them to the court within a year.

Out of the cash payment, the amounts to be first paid, found justly due to the Real and Personal Estate Association and the Junction Railroad Company, for the use of their property while in the possession of the Receiver, and all sums properly due by the Receiver, or any other person acting under authority of the court by its orders; then the proper costs of the causes and the expenses of the complainants in prosecuting the cause for the benefit of all parties interested, and the remainder to be distributed among the holders of the mortgage bonds.

It was decreed that Pulsford and Tucker were entitled to no relief against the complainants, in regard to the establishment of the lien claimed by them as prior to that of the complainants, and their cross-bill was dismissed, with costs; but with the right to payment out of any surplus remaining after payment of all the bonds.

The order confirming the Master's report in April, 1869, was set aside, as to his conclusions on the inquiries proposed in the former decree, and the court found that no cause had been made by the pleadings or proof, entitling the complainants to an account against any of the individual defendants, or the Association, the Junction Company, or the successor

Galveston, Houston and Henderson Company, of the rents, incomes, issues and profits of the property claimed by them as acquired after March 6, 1860, or of the railroad while used by them since that date, and up to the filing of the bill; and that no case had been made, requiring the rents, issues, income and profits, since the 6th of March, 1860, to be subjected to the lien of the mortgages or deeds of trust.

And the bill was dismissed, without costs, as to such accounting, and the liability to the mortgages and deeds of trust, of the real estate, lots, lands, machine-shops, stations, or depôt-houses, engine-houses, ware-houses, and other buildings, erected by the members of the Association at Galveston, the rolling-stock acquired by the Association or Junction Company since that date, and the lands, track, rails, depôt and machine-shops and warehouses in Houston, acquired or erected by the Junction Company, since the same date; and the amount of money on hand, taken into his possession by the Receiver, less the payments legally made for liabilities then due and owing by the defendants; which property the Receiver was directed to re-deliver; and just compensation for use, rent and hire and deterioration of such property of the Association and Junction Company, taken into possession by the Receiver, from the time he took possession, to the final determination of the cause, to be paid to the defendants, and be a first lien on all the mortgaged premises, to be paid prior to the mortgage debts; the amount to be afterwards determined by the court; and as to the Junction Company, and all the individual defendants, the bill dismissed, without prejudice to the decree of foreclosure.

By a subsequent order, (*Rec.*, 1,014) the complainants were, by consent of all the parties *except Pulsford and Tucker*, substituted in the place of the Receiver; they, or part of them, or a person appointed by them, to act as Receivers, under the present and other orders of the court, giving bond in the sum of $350,000.

The Successor company appealed from so much of the decree as sustained the validity and effect of the mortgages or deeds of trust, and as decreed foreclosure and sale, and from all of the decree that is in favor of the complainants and against the Successor company, and as granted any relief to the complainants against it, and as held that they have any case entitling them to relief.

to mortgage for a particular purpose, did not abridge the general power. A power to purchase lands, necessary and convenient for prosecuting their works, and to dispose of the same, implies a power to mortgage them, to secure the debts of the company. 2 *Redfield, Law of Railways*, 459. It is held in Alabama that where a Legislature gives power to a railway company to mortgage or pledge its property for the payment of loans, a deed executed under this power, assigning the road and all its effects, conveys all the powers and franchises of the original corporation. The court said, "In our judgment, the general powers of the corporation extended to the creation of a lien on all its property, without reference to the mode of creating the debt." *Allen* v. *Montgomery Railway*, 11 *Ala.*, 437; *Pollard* v. *Maddox*, 28 *Ala.*, 321.

The law seems to be that the franchise of corporate action is not alienable at will by a railroad company. The deed or mortgage of a company, as a mortgage of *property*, is undoubtedly valid, but cannot transfer the corporate franchise. But Judge Redfield doubts whether the *bonâ fide* mortgagees of the entire property, business and franchises of such a corporation may not, by the aid of a court of equity, obtain such control over the franchise of the corporation, as will enable them to make the foreclosure of their mortgage available to them. *Ch.* xxxiii, § 235, *No.* 12, *n.* 22.

It has been held that the power to buy or sell real estate, and the general right to borrow money, on the part of a corporation, imply the power to mortgage its property, real and personal, to secure the payment. A right of way may be mortgaged for the security of money borrowed, and in default of payment may be sold and transferred to the purchaser; and it will make no difference that the title is so acquired by another railway company, *provided the original purpose and object of the grant be not thereby defeated or altered.*" *Junction Railway Company* v. *Ruggles*, 7 Ohio, N. S. 1. For the general principle, see Redfield, same §, *No.* 10 and *n.* 18. It is but an elementary principle in the law of corporations, and requires no labored citation of cases in its support. The decision of the Ohio Court is only pertinent as showing into what straits courts are often driven, when it is not the Legislative will that becomes law, but the opinions of judges, reached by argumentation. If the right of way can be sold, cannot the purchaser, whether an individual or another or

rival company, do what he or it pleases with it? Will it not by the purchase become his or its own? If one buys a house at execution sale, can he not pull it down or remove it? If a note or bond, can he not burn it? If a horse, can he not drop him overboard into the sea? Who is to compel the other railway company, when it has bought the right of way, to *use* it, perhaps against its own interest, and to carry out "the original purpose and object of the grant?" If these are not to be put in jeopardy, the right of way cannot be mortgaged at all.

Clearly, a *corporation* that can buy and sell real estate and borrow money, may mortgage the real estate to secure the loan. *Cela va sans dire.* But it must *be* the corporation that makes the mortgage. *When* it is so, is to be determined. The act of the Directory may or may not be so; may be so in a mortgage of lands, and not so in a mortgage of the road or franchise. And then the question will remain, whether after-acquired property will be seized on by such a mortgage, when it is acquired, without regard to any rights of those whose money furnishes or whose labor creates it.

Unfortunately, judges, like disputants, are often drifted further and further apart by argumentation, and so "distress" us with conflict of "authority," and sharp dissenting opinions.

In *Coe* v. *Columbus, P. & Ind. R. Co.*, 10 Ohio, N. S., 372, it was decided that a railway corporation, under its general and ordinary corporate powers, could not alienate the franchise to *be* a corporation, or that for constructing and maintaining a railway, and receiving tolls for the transportation of passengers and freight, nor any interest held exclusively for the purpose of exercising its corporate functions.

A man may sell or mortgage his property, of whatever nature it may be; but he cannot sell or mortgage *himself*. The franchise *to be* a corporation is the life, being and very self of the corporation. It cannot sell or mortgage that. *That* cannot be sold under execution.

And yet we see, in this case, that a sheriff in Texas was able to perform that feat; that thereupon the corporation gave up the ghost, and its "franchise" became vested in one Terry, who claims to have the franchise and to be the corporation, with a misty and confused idea that he could not well buy the franchise and kill the corporation for $28,000, and so that, somehow or other, he must be equitably bound

to pay the debts of the deceased entity, as soon as it might be in his power.

We find him, also, transferring this franchise, or associating with himself a number of individuals as owners of it, and these, *ipso facto*, becoming the "Successor" Galveston, Houston and Henderson Railroad Corporation. The Circuit Court gravely treats them as a corporation, concedes that the "Predecessor" corporation has been gathered to its fathers; decrees in regard to the rights of the successor, and IT is now here, appellant and appellee, in this Court.

The Court, in the case last cited, held that where a corporation had the power to borrow money and to execute bonds for the same, and to pledge for the security of the same, by mortgage or otherwise, the entire road, fixtures and equipments, with all the appurtenances, income and resources thereof, though it could not mortgage the franchise to be a corporation, it could mortgage the franchise to maintain the railway, and to take tolls for its traffic in freight and passengers, and also all its property, real and personal, *present and prospective*, and the *use* of its franchise for the enjoyment of the same.

In *Pierce* v. *Emery*, 32 *New Hamp.*, 504, it was said as to public railways: They cannot convey away their franchise and corporate rights, nor perhaps the track and right of way, which they take and hold for the necessary use of their road.

It does not seem to be of great importance whether a railroad corporation can or cannot mortgage or convey its franchise to have right of way, a hereditament in the soil for use, the right to build the road, operate it, and receive tolls and freight. For if it can mortgage all its property, real and personal, and its future income and earnings, it can put it in the power of its creditors at any time to incapacitate it to exercise any of these franchises, and, when all its property is sold, its franchise *to be* a corporation, without aim, purpose, or object, power, or capacity, will be like a lost soul wandering in vague space. If not dead, it will at least sleep a sleep that knows no waking. It will have become, indeed, a simple metaphysical abstraction.

The cases must be right, cited by Redfield, which have held that the franchise of a railway cannot be sold or assigned without the consent of the power that granted it; and that if the road is assigned, the franchise does not pass

with it, nor is the corporation thereby dissolved. That it had been left naked of property and powers, is good ground for seizing its franchises into the hands of the State.

But the notion that whether a corporation can convey away its franchise to exist and act, is a matter between it and the State, with which third persons have nothing to do, will itself not do. The act done is either valid or null. It is void, for want of power, and because the franchise to be, to have continuance, to *live* and *act*, is not *property* of the corporation, which it can cede or mortgage. One might as well imagine nationality, or the national existence of a people, to be the *property* of the nation, subject to mortgage by it.

In *Commonwealth* v. *Smith*, 10 *Allen*, 448, it was held that a corporation is not authorized, at common law, to mortgage its franchise, without some further authority. But in *Hendee* v. *Pinkerton*, 14 *Allen*, 381, it was held that a railway corporation, having authority to hold lands for depôts and storehouses, as well as for railway purposes, and to allow other railways to establish other depôts upon its premises, and sell or lease the land necessary therefor; but having no express authority to create mortgages upon its property, may lawfully mortgage lands held by it, *and not required for railway purposes*, to secure bonds issued by it. In *Richardson* v. *Sibley*, 11 *Allen*, 65, it was held that a street-railway corporation has no power to mortgage its *property*, *franchise* or *road*, without legislative authority.

In *Miller* v. *R. and W. Railway Company*, 36 *Verm.*, 452, the Court held that a railroad corporation could mortgage the road and its franchises to build, own, and operate it, and to take tolls on it, and adopted this language, used in *Bank of Middlebury* v. *Edgerton*, 30 *Verm.*, 190: "It is not necessary in this case that we should hold that the franchise to this company to be a corporation, is the subject of sale or transfer. The right to build, own, manage and run a railroad, and take tolls therefor, is not of necessity of a corporate character, or dependent upon corporate rights. It may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable."

In that case the *directors* voted to issue bonds for the purpose of procuring iron, to be secured by mortgage of the road and franchises. The president was appointed agent and attorney to execute the mortgage. The stockholders

to pay the debts of the deceased entity, as soon as it might be in his power.

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In that case the *directors* voted to issue bonds for the purpose of procuring iron, to be secured by mortgage of the road and franchises. The president was appointed agent and attorney to execute the mortgage. The stockholders

had not authorized it, but when it was made known to them afterwards they accepted the report and made no objection. The mortgage was made by the president as grantor, and the covenants were personally his own.

The court held that there being no statutory *restriction*, the corporation had implied power to make such a mortgage; and said that the directors voted to issue the bonds and make the mortgage, with the knowledge and concurrence of all the stockholders; and the rails so obtained were used to complete the road. They held that the stockholders gave the authority, by their "knowledge and concurrence," and afterwards ratified what had been done.

In *Commonwealth* v. *Smith*, the court held that there were insuperable objections to the doctrine that the franchise of a railroad company can be alienated and its powers and privileges conferred upon another person or body, without authority other than that derived from the fact of its incorporation. The franchise to be a corporation clearly *cannot* be transferred by *any* corporate body, of its own will. Such a franchise is not in its nature transmissible. And, as to the franchises to be *enjoyed* and *used* by the corporation, *their* transfer essentially differs from the mere alienation of ordinary corporate property. The right of a railroad company to continue in existence depends upon the due performance of its public duties. Having once established its road, if that and its powers of managing, using and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end.

The court said that the exercise of such a power had never been sanctioned in Massachusetts, in the absence of Legislative authority for it. Bonds issued in violation of a statute, they said, are void, and so these were in that case, because they did not conform to the conditions prescribed by law. Their illegality was apparent on their face; the mortgage to secure them was illegal also; and both could be impeached collaterally by a subsequent mortgagee.

See the remarks of Judge Redfield on this case, iii, 577, 589, *et Seq.* He says that the statute meant to fix the only lawful mode of issuing such securities, and the company had no power to issue them in any other way. That power was denied by implication: even negotiable securities, so issued, or *ultra vires*, can have no binding force in the hands of any one, how fairly soever obtained or fully paid for; and any

person taking even negotiable securities upon the credit of any corporation, which is a party to them must, at his peril learn the powers of the company, whether they depend on its charter or the general law, before he can be said to have exercised due caution in giving credit to the paper on the responsibility of the company. *Id.*, 681.

The learned writer says, further; "In England, it seems well settled that a railway corporation, without legislative authority for that purpose, cannot enter into any contract of lease, mortgage or sale, with any person, national or corporate, which contemplates the transfer of the possession of their road, either presently or in any future contingency, contemplated and provided for in the contract."

This, he thinks, is the true rule upon the subject, and likely to be at last adopted everywhere.

It has never been made a question, he says, anywhere, that a railway company, like any other business corporation, may create a valid lien, by way of mortgage, upon the property, real and personal, of the corporation; and that where it has the franchise of taking tolls, the mortgage may be so made as to create a prior lien on the tolls; nor that all this may be done under the general powers of the corporation. To give the conveyance of the *property* any reasonable operation, it must be treated in equity as creating a lien on the tolls or earnings.

He is not prepared to say that this view is not sound, though as it warrants putting the property temporarily in the hands of a receiver, "it is attended with some difficulties and embarrassments in the detail." And latterly the courts in some of the States have gone so far as to say that a railway company, without legislative authority, cannot create any valid lien on its road-bed and superstructure. He thinks the tendency of decisions is that way, and that it may in the end be settled so, though he is not convinced of its soundness.

Upon the case of *Miller* v. *R. & W. Railway Co.*, the same jurisconsult remarks, (iii, 558, *et seq.*,) that the case was one in which it was sought to appropriate all the available means of the company, to the exclusion of all the other creditors, under what assumed to be a mortgage, not only of all the real estate and fixtures of the company, but of all the corporate franchises and the corporate existence: That this contract was executed by a corporation whose charter

in terms secured such franchises to the company alone, and when, by the general laws of the State, no power to assign such franchises existed. This, too, without the action of the corporation itself, but only through the agency of the direc ors, and by oral proof of the assent of the stockholders, or rather that when informed of the fact of the attempt to execute such an instrument they were silent. Such an attempt is expressly declared by the House of Lords (*The Bank of Ireland* v. *Evans' Charity*, 5 *Ho. of Lords Cas.*, 389,) to be of no validity, if done without the authority of the corporation.

As all the stockholders together cannot convey the real estate of the corporation by their deed, so the directors cannot convey the franchises. These belong to the stockholders. They are strictly personal and inalienable; in regard to railways, peculiarly so.

And the question as to such a mortgage is not between the corporation and the State. It is a question in regard to the *power* and *capacity* of the corporation. If the act is *ultra vires*, it is void, and any party interested may have advantage of its nullity.

A mortgage executed only in pursuance of a vote of the *directors*, is not executed by the authority of the *corporation*. (*Id.*, 563.) It has been repeatedly decided that the directors have no such power. *They are only the general business agents of the company.* They have consequently only authority to transact those functions of the company which come under the general denomination of *business*. "All the business" of a company does not imply anything more than the *ordinary* business; what is called the *proper* business of such company, *i. e.*, in the case of a railway, the construction and operation of their road. The assignment of all the franchises and all the property of a corporation would be to *annihilate*, and not to *transact*, its business; and it has been repeatedly decided that the directors of joint-stock corporations, and particularly railways, have no such powers.

In Vol. ii, 452, *n.*, the learned author refers to a case before Vice Chancellor Stuart, in which it was held, on great consideration, that where the directors of a joint stock corporation issued debentures (bonds not negotiable) without complying with the requirements of the deed of settlement, in regard to borrowing money, and such certificates came into the possession of *bonâ fide* holders, for value, without

notice of any infirmity affecting them, such holders could not recover for them, as regarded the great body of the shareholders. The style of the case and volume are not given.

In *Steiner's Appeal*, 27 *Penn. St.*, 313, it was held that a canal company could not, without the consent of the Legislature, mortgage either its tolls, or such real estate as was necessary for the enjoyment of its corporate franchises.

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The charter of this company created four persons and their associates and successors a body politic and corporate. "The immediate control and direction of the affairs of the company" was vested in a board of not less than five directors; every share of stock entitling the owner to one vote "at all meetings of the company."

The provision as to conveyances and contracts makes them valid, when executed, signed, &c., in a certain manner, under seal of the company, and in pursuance of a vote of the directors. This is sufficient to authorize the signing and sealing of the written instrument; but it does not define the authority which shall act in order to make the *contract* itself, of which the writing is but the evidence. The general expressions used would not warrant the conclusion that an assignment of all the property and franchises, or a surrender of the charter, would be valid, if made only in pursuance of a vote of the directors.

By Sec. 7 power was given the company to purchase and hold land necessary for the purpose of locating, constructing and maintaining the railroad, with all necessary depôts and other buildings; but only to a specified width.

And Sec. 9 authorized the acquisition of *other* lands, (no doubt in view both of a gratuity from the State, and of private donations,) for the purpose of aiding in building or maintaining the road: "AND SUCH REAL ESTATE ACQUIRED BY THE COMPANY, *may be alienated or mortgaged by a vote of the majority of the directors, for the constructing or maintaining said railway.*"

Now, we submit it to the court, with entire confidence, that either the lands spoken of in Sec. 7 could not be alienated or mortgaged at all; or they could not be so by a vote of the majority of the directors. The express power given to mortgage or alien the lands acquired under Section 9, ex-

cludes that power as to those to be obtained under Sec. 7, and, at the very least, *there is no power or authority given to mortgage or alien the road-bed and the land fifty yards in width, on which it was to be built, nor the depôts and other buildings and the land on which they were to stand.*

Sec. 10 gives the power to borrow money on their bonds or notes. It is not said how they may be secured; but no mortgage is authorized except by Sec. 9; and it is a fair construction, as these acquired lands were to be mortgaged or aliened for the purpose of building or maintaining the road, the notes or bonds were to be secured by mortgage of them alone.

Moreover, the land on which the road was to be builded, and the road-bed and the road itself could not be mortgaged, so as to give any sufficient and valid security, because the whole charter was to be null and void, if the road were not commenced within one year, and forty miles of it finished within three more.

Now, the first mortgage was made on the 1st of December, 1853, and the 6 per cent. bonds secured by it bore date the same day, (*Rec.*, 9); and it undertook to convey to the trustees, *the whole road* to be constructed from Galveston to Houston, with all the *railways*, rails, bridges, fences, privileges, rights, and real estate, then owned or thereafter to be owned by the company in connection with the road, all the tolls, incomes, issues and profits, *all the franchises* of the company, all the lands to be occupied for depôts or stations, and the buildings to he erected on them; with covenants of further assurance as to the road when completed, and after-acquired property; with power of sale upon three months' default to pay a coupon.

This instrument, made at New York, was sealed with the corporate seal, signed by the President, and countersigned by the treasurer.

The other two conveyed the same property and expectancies, and were signed by the same parties, and sealed with the corporate seal.

The cash book of the original company shows that the following stockholders had paid sums of money during 1853, on their subscriptions, amounting to $85,712.14; William C. Lacy, Aaron H. Bean, Richard B. Kimball, William C. Valentine, John H. Hand, Thomas D. Chapman, Jacob de Cordova, Michael Giblin, and Henry Thomas. (*Rec.*, 679.)

The Board of Directors never met in Texas. They held their meetings in New York, where they had an office. James D. Giblin, who was then clerk there, states that prior to 1859, so far as he remembers, no persons were ever present at their meetings except Kimball, Hand and Bean, who were directors, and M. Giblin, who was secretary. (*Rec.*, 309.)

It will be noticed that in the first mortgage it is recited that the company had decided, *by a resolution of the Board of Directors*, to set apart, after the completion of the road, $25,000 per annum, in a sinking-fund for the redemption of the six per cent. bonds, *before declaring any dividend to shareholders.*

We do not find in the record any record of any vote or action of the Board of Directors authorizing the issue of the bonds and execution of the mortgages, or of the adoption of the resolution mentioned in the mortgage.

William J. Valentine, who was the financial agent of the company, and who countersigned the 6 per cent. bonds, was asked (cross-interrogatory 29, *Rec.*, 322,) if he had at any time seen copies or papers purporting to be copies, of any vote or votes of the Board of Directors, under which the three mortgages purport to have been made. He answered, (*Rec.*, 329,) "I have no recollection; I think I must have seen them; but I cannot now say in whose possession they were or are."

The complainants asked no question in regard to any such vote, of him or of Giblin; and Giblin stated that he knew nothing beyond what he had replied that could be of benefit to either party or material in the case. (*Rec.*, 309, *answer to interrogatory* 13 *at* 305.)

J. B. Wheelock, (one of the firm of Micard, Valentine & Co., who negotiated the 6 per cents.,) says, "While acting in London and Paris in behalf of the company, I saw copies of votes passed by the Board of Directors, authorizing the creation and disposal of the bonds brought over by Mr. Kimball, and also creating him attorney with full powers. They were first in the hands of Mr. Kimball, afterwards seen in the hands of bankers, and for a time were deposited with our firm." This was an answer to a cross interrogatory. The complainants asked him no questions in regard to such votes. (*Rec.*, 363.)

Aaron H. Bean, who was a director from the beginning,

says nothing in regard to the action of the Board of Directors; nor did the complainants seek to prove by him that there was any such action. (*Rec.*, 369.)

Cowdrey, one of the complainants, had seen what purported to be a partial copy of the minutes of the Board of Directors. It was brought to him in December, 1867, by J. Gibiin, formerly a clerk in the office of the company. Cowdrey carried it to Texas, and placed it in the office of the Receiver. He never examined it with any care, and attached little importance to it. He *believes* it purported to give a record of the meetings of the Board of Directors, authorizing the making of the 6 and 10 per cent. mortgages. It was not authenticated. He has no copy of the resolutions, proceeding, votes or acts, authorizing the issue of the bonds and mortgages. (*Rec.*, 373.) Frederick P. James knows of none. (*Rec.*, 374.) Nor do Parsons or Sherman. (*Rec.*, 375, 376.)

The *Defendants* took Kimball's deposition, and inquired particularly, (*Int.*, 5,) as to the action of the Board of Directors, if there was any, in regard to the mortgages, who were directors at each time, how notified to attend, and which of them were present. (*Rec.*, 394, 395.)

He answered that up to 1857, all the meetings of the Directory were held at New York. The meeting in regard to the first mortgage was held in 1853. Thinks that Lacy, Bean, Hand and himself were among the directors, and does not remember the names of any others. Does not remember how the directors were notified, or who were present. Knows there was a quorum. He makes the same statement in regard to the second mortgage; and remembers nothing about that in regard to the third; but refers to the record for each. (*Rec.*, 401.) The record book made up from the minutes was sent to Texas by him, in the latter part of 1856, or early in 1857, to Walker, Chapman or Shackelford, by express. It contained a record of all the meetings. (*Rec.* 404.)

Thomas D. Chapman thinks that Kimball brought the books of record to Texas, in April 1857, when the Directors were required by act of the Legislature of Texas to hold their meetings in that State, if they would have the benefit of the acts granting lands to the company. Thinks the books were delivered to Tipton Walker, Secretary of the company, (afterwards Receiver). (*Rec.*, 412).

Walker, in an affidavit filed by him on the 2d of January, 1868, stated that the books of the company were brought from New York to Texas, and placed in his possession, he then being Secretary of the company. Afterwards he delivered them to Alfred F. James, Secretary *ad interim*. James had them until he died in 1860, as manager of the new company, or in some other capacity; and Walker had all of them, after he became Receiver, *except the record-book of the meetings of the Directors and Stockholders*, which was last seen in the hands of James, of whose will Ballinger is one of the executors. (*Rec.*, 1,731).

The defendants gave notice (*Rec.*, 185), that they proposed to cross-examine Walker, and desired the production of the books in his possession.

Pierce stated on oath that he had in vain endeavored to find the records of the Directors, authorizing the mortgages, and that the defendants had never had them. (*Rec.*, 170,1.) Cowdrey swore (*Rec.*, 171,2) that the complainants had never had any of the books, except one purporting to have been intended as a duplicate or copy of an original record-book of the proceedings of the Directors, not completed, which was handed to him by Giblin, and could be inspected by the defendants.

Ballinger swore that the records were not to be found among the effects of James, and denied that they ever were in his hands. (*Rec.*, 178).

J. M. Brown became President of the new company in the fall of 1860, and swore that no such book was at any time afterwards in the office of the company. (*Rec.*, 182), and Mrs. James swore that no such book was in possession of James, at his residence at the time of his death, or ever was in her possession. (*Rec.*, 183).

Compton swore that there was *a* book in the possession of James, when he was President of the company, which contained a record of its proceedings while Smith was President. Walker told him, two days before he deposed, that it contained the records of the company *prior to* its removal to Texas; but the defendant did not examine it, and could not say whether that was true. He thinks it was turned over to Hitchcock. It was kept at the railroad office.

On the 9th of March, 1868, (*Rec.*, 219) the defendants notified the complainants that they would be required to prove on the hearing, the orders, resolutions, proceedings or other

authority of the company, under which each mortgage was made; the existence and making of any such being denied.

On the 18th of May, 1868, (*Rec.*, 244), the complainants notified the defendants to produce the original record book of the proceedings of the Stockholders and Directors of the original company.

All the written testimony read on the hearing is stated on the record, (*Rec.*, 280,) and does not include this record book or a copy of it.

When the mortgages were offered in evidence by the complainants, the defendants objected to them, because no authority from the company for their execution was shown, in any manner whatever. (*Rec.*, 593). The court overruled this and other objections.

It will be difficult to resist the conclusion that the original record-book was purposely suppressed, and only a partial and unauthenticated copy of portions of it sent to Texas, and that there really was no valid action on the part of the Board of Directors, authorizing the issue of any of the bonds, and the execution of the mortgages. It is quite certain that no action of, or authority from the stockholders generally, is pretended to have been had or given. And we submit, that even if the charter had given the *company* power to mortgage the road and the land over which it was to run, the Directors could not do so without authority by vote of the stockholders. In addition to which, the power to mortgage lands for the purpose of raising money to build the road, is confined by the charter to *other* lands, that might be acquired by the company.

Redfield says, (ch. xxxii, §. 234, No. 11); "If, instead of making reasonable examination of matters obviously within his reach, one sits down blindly to adventure millions upon a spurious issue of stock in such sums and at such times as to induce most prudent men to hesitate about its genuineness, it is perhaps not unreasonable that he should be held bound by such facts as the slightest examination must have disclosed. This is the rule in regard to most commercial and business transactions, and we see no special hardship in its application here, within reasonable limits."

1,500 6 per cent. bonds, each of £100 sterling, were issued, and placed in the hands of Valentine. He accounts for them thus: (*Rec.*, 324.)

44 sold for about 80 per cent. cash, and proceeds accounted for to the company.

648 deposited with London and Eastern Bank, under an arrangement with Braine, joint financial agent with Valentine.

308 cancelled and returned to the president of the company.

500 left at the office of the company in New York.

The *second* mortgage (to secure the 10 per cent. bonds, to be issued to the amount of $750,000,) expressly declared that it was *to take the place of the former conveyance* for a like sum, or its equivalent in pounds sterling [£150,000]; and these express words followed: "And the issue of the bonds referred to in this instrument *can take place only by the cancelling of a like amount of the said six per cent.* sterling bonds, so that this instrument is, and shall be, a first lien," &c.

These 10 per cent. bonds, Valentine accounts for thus:

$231,700, negotiated and sold in Germany and other places in Europe, proceeds accounted for to the company at 80 per cent.

It is plain that *these* were not issued to take the place of 6 per cent. bonds.

$154,000, deposited with the London and Eastern Bank, in lieu of 308 6 per cents., surrendered.

Leaving, it seems, 648 6 per cents. still deposited with that bank.

$34,300 paid Braine in settlement of a special indebtedness of the company to him, *by consent of the president.*

These, also, were not issued in lieu of 6 per cents.

$330,000 delivered to Nicolas Micard and Peignere & Co., when they superseded Valentine as financial agents of the company.

We will see whether these were issued in lieu of the 6 per cents.

In October, 1859, $50,000 of them were in the hands of Condor, Goode & Co., for iron purchased of them, which the company had. $780,000 were held by Micard, Peignere & Co., as security for an advance of one million francs.

Messrs. Ball and Stewart were the liquidators of the London and Eastern Bank, which went into liquidation in November, 1857. Stewart was one of a committee appointed in March or April, 1857, for the purpose of winding it up. He *then* received a *large* number of the 6 and 10 per cent. bonds, how many neither he nor Ball could say. He and Ball disposed of *all* the bonds and coupons in their posses-

sion, belonging to that bank, to E. Cox Nichols, and Kimball—to the former £6,000 worth, and to the latter £5,000 worth, *i. e.* £11,000, or $55,000 for the whole lot, of (if the bank had disposed of none) 648 6 per cents., and $154,000 10 per cents.; *i. e.* $478,000, beside the overdue coupons. The percentage at which the value was estimated, is easily calculated. Kimball also took another lot, (how many is not stated) which did not belong to that bank, for £250—"*certain* bonds and coupons" for $1,000. (*Rec.*, 662, '3.)

The *date* of this transaction is not given, but it was necessarily subsequent to December, 1857, because Ball did not become liquidator until then.

Now, in October, 1857, the 8 per cent. bonds were issued, and the third mortgage made, in part to take the place of the second mortgage, securing 3,850 ten per cent. bonds amounting in all to $750,000, (of which Nichols Kimball afterward bought $154,000, and 648 6 per cent. bonds, for which, as the 10 per cents. were to be substituted for them, and the 8 per cents. for these, they could take 8 per cents., and Kimball purchased "certain bonds and coupons" besides.) Of the amount of 8 per cent. bonds $750,000 was set apart and reserved, and could only be issued by cancelling *pro tanto* the 10 per cent. bonds, which, by the second mortgage, could only have been issued in lieu of the 6 per cents. (*Rec.*, 22.)

As there is no *proof* that any of the stockholders or directors, except Kimball, Hand, and Valentine, had any thing at all to do with the issuing of the bonds, or the authorization or execution of the mortgages, (and Kimball cannot recollect *who* had, but only that there was always a quorum, *i. e.*, three of five,) it will be well enough to look at the evidence in regard to the *mode* in which the 10 per cent. bonds were issued and dealt with, and the proceeds used. Forshey (*Rec.*, 1,056, '7,) gives a vivid picture of the operations of the company, and is not dainty in his terms. "This fellow," (Chapman) he says, "and the so-called president of the company, Richard B. Kimball, were without honor or moral honesty." No body having money ever visited Texas in the interests of the road. The whole affair was speculation; no money was in it. The grading commenced in November, 1853. In August, 1854, not quite fifteen miles were graded, though the 6 per cents. had been on the market seven or eight months. Of the money subscribed for stock, it had

required $28,725.60 to pay "preliminiary expenses of purchasing charter" (*Rec.*, 679); and Forshey, the chief engineer, thinks there was no real company, but only a knot of speculators, and that Kimball was getting the money on the bonds, and letting a little of it ooze out upon the road for the sake of appearances. Lacy, a stockholder and director, was as much disgusted as any body, for even he could not get what the company owed him.

The notice that Forshy got of the company, at New Orleans, in the autumn of 1853, was that its "capital" was $4,000,000, and of that *a million paid in*. (*Rec.*, 1056.) The whole road, to Henderson, was to be built at once; to Houston, in a year.

Count d'Alton Shee, (*Rec.*, 712,) gives a pretty full account of Kimball's operations. He became connected with "the company," on the 3d of December, 1856, when Mons. Peignere, a banker at Paris, signed a contract with Valentine & Micard, representatives of "the company," for a loan of a million francs, against a deposit of these 10 per cent. bonds, (which, by the very mortgage securing them, could not lawfully be issued except in cancellation of equal amounts of 6 per cents.) The Count himself took 190,000 francs of the loan, which he paid over to Peignere, and never received money or bonds for.

Kimball affirmed that the 6 per cent. bonds had been cancelled, replaced by like amounts of 10 per cents., except £4,100 sterling.

His report, made November 1st, 1859, is a part of his deposition. (*Rec.*, 715.)

Kimball alleged that $305,000 of the stock had been taken.

On the 9th of November, 1853, *in the name of the company*, Kimball *gave* to Valentine, for his negotiations in Europe, and procuring a grant of land, a *subsidy* of £500 sterling in redeemed shares, for every mile constructed.

Micard, Valentine, Colman & Co. were intrusted with the negotiation of the 10 per cent. bonds. The 6 per cents. were not all re-issued; but Shee does not agree with Valentine as to the amount of them held by the London and Eastern Bank. He says that bank held $160,000 of the 6 per cents., and that $154,000 10 per cents. were deposited for them, and that it held *both* to secure a loan of $100,000.

In November, 1856, Braine and Valentine made a provisional contract with Micard to loan the company a million

francs within two months. The loan, at the instance of Micard, was made by Peignere, to be repaid by the 9th of September, 1857, and was for the purpose of completing the first twenty-five miles of the road. The written agreement was made on the 2d of January, 1857, a Provisional Board was then established at Paris, of which Micard and Peignere were members, and Count Shee, President, to procure capital for furnishing the road. Kimball appointed Micard to be agent in Europe.

By the end of April, 1857, Kimball had by draft exhausted the whole million, and even overdrawn. He still continued to draw, until Peignere & Co. declined to pay. The section of twenty-five miles was now open and in operation, and the Board authorized Peignere & Co. to open another credit with Kimball, of 300,000 francs, to complete the road to Harrisburg, fifteen miles further. Then "the company" purposed to issue the 26,250 8 per cents., and the third hypothecary act "regularized" their issue.

But the agent of the European board went to Texas, and found that of the last loan of 300,000 francs, scarcely $25,000 had been paid to the contractors, and they refused to continue the work; nor *could* it be finished within the time prescribed by the Legislature.

Kimball, nevertheless, continued to "draw," until he exhausted over a million of francs on the *second credit.* "*Most of these drafts, the use of which still remains to be accounted for, are to the order of Messrs. H. Bean, Chapman & Giblin, administrators; some even are to the direct order of Mr. Kimball.*" (*Rec.*, 719.)

On the 5th of November, 1857, finding that the 15 miles were not completed, the work suspended, and part of the rails in deposit at New York, the European parties declined to accept further.

*More than a million francs was diverted from its legitimate uses.*

An extension of time was obtained from the Legislature, by the agent of the European Board, aided by others, (Saint Cyr and Briggs, who made an advance to the company); and the agent, for the same purpose, drew several drafts. About that time, (December, 1857,) Kimball, "in whose person all the powers of the company centred," appeared in Paris. Notwithstanding the enormous amounts he had received, it was useless to sue him, and to do so would discredit the

whole affair. The European Board thought it wiser to treat with him, and get a new board appointed in Texas, of honest men, providing against any *future* misappropriation of funds.

Kimball had them in his grasp, and would make no agreement, unless they would consent *that of the* $260,000 *shares issued in America to supposed subscribers*, of whom he claimed to be the representative, $150,000 should be exchanged at par for 1,500 8 per cent. bonds. The holders were Kimball, Valentine, Hand, Giblin and Chapman, and Kimball also *gave* Saint Cyr 200 bonds, to remunerate him for participating in the treaty. Kimball had contracted with Chapman to build part of the road, at $29,500 a mile. It could have been done at $11,000.

The European board obtained the right to appoint half the members of the New Texan Directory. They selected Walker, Hayne and Parizot. They reserved the right of making contracts for construction, and of passing on those made by the Texan Board, and "a right of serious and efficient control over the transactions in America;" with the express clause that all funds collected in Europe should be paid directly to the contractors, as the work went on.

Of the 8 per cents., as this agreement, signed April 3d, 1858, stated, only 7,429 had been delivered by the company. Kimball stipulated to deliver the remaining 18,121 before the 1st of July, 1858.

On the same day, contracts were signed by Kimball, as President of the company, and Shee and Pignere, members of the board of attorneys in fact, with Saint Cyr, to complete the road to Harrisburg, to build the 4 miles from that point to the Houston Central, and also the 6 miles from Virginia Point to Galveston, and the 25 beyond Houston, at $11,000 a mile, for grading, engineering works and cross-ties, *the company* to supply the rails and rolling stock.

In May, Kimball returned from New York to Paris, with 4,500 bonds.

Saint Cyr had to *buy* rails, in place of 240 tons that had been pledged in New York. $29,000, which the European Board had advanced for chairs, wedges, spikes, &c., had received another destination, and the attorneys had to advance 65,000 francs, to remove the lien on the iron, which, after all, had been *sold*.

The new Board met in July, 1858, (the 15th,) and ratified the contracts made at Paris in April.

The road was opened to Harrisburg on the 1st of November, 1858, and by the end of the year nearly completed to Houston. Saint Cyr was paid $157,839, in addition to $25,000 paid by the agent to other parties. *The third contract*, for six miles from Galveston to Virginia City, and twenty-five miles beyond Houston, *was then cancelled.*

Funds became wanting. The debt contracted in Europe by the attorneys, for the last million, could not be paid at maturity, and ruinous renewals were resorted to. It was supposed in Texas that all the 8 per cents., (26,250,) had been disposed of, and Walker went to Europe to investigate the matter. After his return, he apprised the parties in Europe that the $150,000 exchanged with Kimball represented no capital paid in, but had been distributed gratuitously among Kimball and his friends; and that of the last million francs drawn for by Kimball, not more than $25,000 had been disbursed on the road.

It appeared necessary, before the close of June, 1859, to send sufficient funds to Texas to construct the six miles of road to Galveston, and partly satisfy the American creditors, who had obtained or were obtaining judgments. Mr. Valentine, who had been to Texas, and who was entitled to share in the profits of the road, "on returning to Paris, met, in the office of the attorneys in fact, (Shee and Peignere, representing all the loans on the bonds, effected in Paris,) Mr. Pulsford, already a creditor of the company, and succeeded in concluding, between Kimball and Walker on one side, and him on the other, the agreement for an additional loan of £10,000. On reaching Galveston with the letter of credit for this, he had, (*on the 23d of June*, 1859,) the third mortgage recorded, which had been executed on the 8th of October, 1857, and purposely held back by Kimball from record, the contract with Pulsford having been signed on the 21st of *May*, 1859, at London. (*Rec.*, 726, 23, 111.) *Valentine then had the contract with Pulsford adopted by the Board of Directors*, obtained an extension from the creditors, and established a new Board of Administration, chiefly of merchants and bankers of the country, to go into office as soon as the road was opened between Galveston and Houston. (*Rec.*, 726.)

Count Shee states many causes that continued to depreciate the bonds; the greatest of which was that Kimball, Valentine, St. Cyr, &c., threw on the market the 1450 bonds which they had got in April, which, as they *cost* them nothing, they were satisfied to sell at low prices.

Neither Peignere & Co., nor the Board of Attorneys in fact, after advancing money for three years, could obtain from the company a settlement of accounts, or an acknowledgment of indebtedness. Wherefore Peignere resigned his attorneyship, to sue the company at Paris. The company owed Shee, on personal account, 258,794, 92-100 francs, paid in cash, besides interest; and he had contracted liabilities for the company to the amount of 1,365,311.16-100 francs. And the company owed the Board, including these two amounts, 2,032,396 89-100 francs.

Sharpers had bought up a certain number of these bonds and sued the directors and attorneys in fact on them. 7750 of the 8 per cents. were still in the hands of the company. (*Rec.*, 727.)

The statement of 8 per cent. bonds disposed of, which is appended to the "Report," is instructive.

1450 were got by Kimball and his coadjutors, for nothing, in pretended exchange for 10 per cents. issued; really, no doubt, for those which he bought of the liquidators of the London and Eastern Bank late in 1857, or early in 1858, for £5,000.

Braine got 500, for services.

147 and 81 went for premiums and commissions on loans, and various services.

Valentine got 240, half the amount allowed him.

There were negotiated or sold in Europe, 8,195, and pledged as guarantee for advances 5,662.

On hand in Europe, 495; and really and in good faith exchanged for 10 per cents., 234.

Pignere, Shee, &c., attorneys in fact, had advanced and paid out for the company 5,877,392 44-100 francs, and received, by nett proceeds of 8,195 bonds sold, 3,844,392 44-100 francs.

The "preliminary exposition," between Kimball, President and Plenipotentiary and Shee and Pignere for the Board of Attorneys in fact, states that about the time when the 6 per cents were created, shares of stock were created for $1,500,000, of which $305.000 had been issued, reresenting $260,000 of original subscriptions, which could be *converted* into 8 per cent. bonds then in the market, with coupons, and at par, and $40,000 in shares of new issue.

However, Kimball, representing the American owners of these $260,000, *consented to receive*, on this issue, in 8 per

cents, $150,000, and *to postpone the* liquidation of the balance, of $110,000, until the next issue for the construction of the other sections of the road.

It stated that the 10 per cents. were to be issued exclusively in exchange for the 6 per cents., and what 6 per cents. were still outstanding.

The division of "profits" provided for by chapter iii of the Treaty is worthy of notice. Kimball and those whom he represented, "the American interested parties," were to have three-tenths of the redeemed shares of the issue of 8 per cents., and 25 per cent of the difference between the *actual* cost price of every mile of road, and $35,000. 39,000 "beneficiary shares" were to be delivered by Kimball to Shee and Pignere on the 20th of May, to be divided according to the treaty. And he was to deliver 5,000 bonds at the same time, and 13,821 by the 1st of July, 1858.

To construct the 6 miles of road from Galveston to Virginia Point, and the 25 beyond Houston, it was stipulated that there should be appropriated, according to the contract with St. Cyr, $11,000 per mile for 29 miles, and $5,000 a mile for the two miles of bridge, and 2,790 tons of rails, to be delivered on the spot, free of all expense.

For the present we simply note, that by virtue of this agreement, proceeds sufficient of the 8 per cents. on hand and to be placed in Paris, were thus *pledged* to the building of the 6 miles of road, and the bondholders in France were bound to furnish the money to build it with, and the rails. If they got the money and iron from Pulsford, they held the bonds to secure *him*. They surely cannot by the aid of a Court of Equity, collect the amount and retain it.

E. Cox Nichols, who bought $6,000 worth of the 6 and 10 per cents. of the liquidators of the London and Eastern Bank, was agent of the company, at London, in 1859. (*Dep. of Walker, Rec.*, 289.)

It is evident that the grave charges against Kimball, made by the defendants in their answers, are not without foundation. The charter of this company, which it cost so round a sum to procure, was one of those of which Judge Redfield speaks, that are "nets to catch the unwary, or gulfs in which to bury out of sight the most disastrous results to private fortunes; and which have justly rendered American investments, taken as a whole, a reproach wherever the name has travelled."

What office is it that will be performed by the court, if, affirming the decree in this case, it gives to the holders of the bonds purporting to be of the company, all the property and assets, to the utter exclusion of the claim of Robert Pulsford?

In *Pierce* v. *Emery*, 32 *New Hamp.*, 484, where the law gave the corporation the right to issue bonds and secure them by mortgage of the whole of the real or personal estate of the corporation, with power to the trustees to sell that, and all the rights, franchises, powers and privileges named in the mortgage, and to convey all these, which the corporation possessed; and the directors made such a mortgage, the court held, that although, as a general rule, nothing can be mortgaged that does not at the time belong to the mortgagee, yet, as the law authorized the mortgaging by the directors, not only of the *existing property* of the road, but of the corporate rights and franchises, and the railway itself, as an entire thing, the trustees would hold subsequently acquired property, *as an incident to the franchise mortgaged*, and as an *accession* to the subject of the mortgage; and would hold *personal* property, subsequently acquired, against subsequent mortgagees of the specific property so acquired.

And in *Coe* v. *McBrown*, 22 *Ind.*, 252; and by this court, in *Fennock* v. *Coe*, 23 *Howard*, the same doctrine is held. It may, by these and other cases, be considered established.

Clearly one cannot *convey*, i. e., part with, that which he *has* not, either in ownership or possession. He may convey what is not his own, if he has it. He may agree or covenant to convey after-acquired property; but if one says "I convey any horse that I may buy hereafter for use on my farm," certainly this is no conveyance of a horse, for no particular horse is indicated. If one conveys land that he does not own, and afterwards procures title, the title inures to the benefit of his grantee, by a technical rule of the common law; but a conveyance of any quarter section of land, or of any lands that he might thereafter acquire, would certainly not operate, at any time, as a conveyance.

But courts of *equity* give effect to assignments, not only of choses in action, but of contingent interests, expectancies and also of things that have no actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true that the assignment can have no positive operation to transfer, *in præsenti*, property in things not in being; but

it operates by way of present *contract*, to take effect and attach to the things assigned, when and as soon as they come *in esse;* and it may be enforced as such a contract *in rem*, *in esse*. *Mitchell* v. *Winslow*, 2 *Story*, 639.

But this principle will not reach far enough to sustain the decisions that a railroad mortgage attaches to personal property subsequently acquired, to the exclusion and overcoming of a specific lien or equity to preference in payment, created *by the very acquisition* of such property; nor, indeed, to deprive a *bonâ fide* purchaser of it, *after* its acquisition from the mortgager.

Story says, "In equity there is a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is matter of agreement, *at least against the party himself*, and third persons who are volunteers and have notice. For it is a general principle in equity, that *as against the party himself and any claiming under him voluntarily or with notice*, such an agreement raises a trust." Eq. Jurisp. § 1, 231.

In *First Mortgage Bondholders* v. *Maysville and Lexington Railway*, it was held that where the road was built, and most of the property of the company was acquired, subsequent to the execution of the mortgage, *although such property could not be held at law*, it might be in equity; and a foreclosure was allowed as to the subsequently acquired property.

Of course there is no difficulty upon general principles, in allowing the mortgage of a specific thing to carry along with it, as incident, subsequent accretions or accessions. An accretion to land is incorporated with it as an integral part of it, and the grain and standing crops are covered by the mortgage. But the equity to have these crops is subject to a higher equity and privilege. The expense of making the crop must be first paid to those whose labor produced it. *Nulli sunt fructus, nisi impensis deductis.* That principle, and some others, we will look at by and by.

And in *The State* v. *Mexican Gulf Railway*, 3 *Robins. Louis.*, it was held that a railway, where the soil on which it is laid belongs to another, the owners not having been expropriated, is not susceptible of being mortgaged, unless authorized by the legislature, and that future property can never be the subject of conventional mortgage. That is under the civil law; but we do not doubt that such a mortgage would fasten on the after-acquired specific land, at common

law. The warranty acts as an estoppel; and equity, too, would not allow a vendee to retain the land, and pay the damages on his covenants, after it had perhaps quadrupled in value.

But the Supreme Court of New York went a long way further, in *The Farmers Loan and Trust Co.* v. *Hendrickson*, 25 *Barb.*, 484, in deciding, *on the grounds assumed*, that the rolling-stock of a railway, such as cars, tenders, and locomotives, is *accessory* to the real estate, and passes by deed as a fixture, or necessary incident; that a mortgage of a railroad, including the rolling-stock, need not be filed as a chattel mortgage, and that bondholders, under a mortgage not so filed, are entitled to the rolling-stock, as against judgment creditors.

The question argued by the court was whether the locomotives and cars are so permanently and inseparably connected with the more substantial realty, as to become constructively fixtures. And it announced that it results from many cases that it is not absolutely necessary that things should be stationary in any one place or position, in order that they should be technically deemed *fixtures*. One would think that what is *fixed* is necessarily stationary—that it must stop moving to *get* fixed. There was a species of moveable property once, it is true, in some of our States, which legislative omnipotence endeavored to make, in law, real estate. But it never succeeded in making moveable and ambulatory human beings real estate, except for certain purposes, such as descent. It never attempted to declare them fixtures, and part of the realty, though undoubtedly often stationary for hours together, especially when asleep.

The wheels are fitted to the rails—the court said—they are constantly upon the rails, and except in case of accidents, or when taken off for repairs, nowhere else; they are not moved off the land belonging to the company; they are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose; they are *permanently* used on the particular road where they are employed, and are seldom, if ever, changed to any other. And, finally, the railway is built for the cars, and not the cars for the railway. As Lord Mansfield said, the house was built for the steelyard, and not the steelyard for the house.

The same ingenious arguments would prove that a man is a fixture. He can only walk, and not fly, and the earth,

we are told, was made for him. Often he lives on one place all his life—one might, in short, say many things about him that are "strong characteristics of the realty." By the same reasoning, one might prove a canal-boat a fixture; and there is no knowing what new provinces of the law a venturous explorer might not open up, by following out the same train of argumentation. A car is stationary no-where, is fixed no-where. A fixture is part of a particular piece of realty. It becomes part of it, and passes, not with it, but as a part of it. It is, in the language of the Roman law, an *immoveable* by destination. A railroad-car is one of the most moveable things one can conceive of, for it goes daily and nightly, and sleeping cars run from New Orleans and Saint Louis, and Chicago, through half a dozen States, to New York.

We cannot agree with Judge Redfield that the opinion is plausible. It insults the understanding. How is it plausible to say of a hand-car, "They are not moved off the land belonging to the company—they are seldom, if ever, changed to any other road." Nor do we agree with him that there is justice and convenience in such a view. His politeness misleads him. It has never been definitely settled, in the French and Belgian courts, whether steam or other machinery, set up in a building, becomes an immoveable by destination, so as to oust the vendor of his lien. It would be gravely inconvenient and unjust, if an individual or company could not hire or lend an engine to a railroad company without its becoming a fixture, and falling into the claws of that omnivorous gigantic spider, a mortgage of the road. It would be unjust and inconvenient in almost every case.

It is well to "make progress;" but we are admonished that, in doing that, we should stand upon the old ways. It is bad enough when counsel resort to such arguments, but it is infinitely worse when the courts fall into that habit. Half the calamities of the world have been caused by bad logic and unfair argument. One inclines to be of Montaigne's opinion, that to address such an argument to one is a worse insult than to strike him. It is an appeal to the *nonsense* of the hearer.

And if no better reason can be found than this, that cars and locomotives are fixtures, accessories, incidents, accretions, and the like, or than the proposition of another court that the rule of law forbidding the sale or mortgage of

property not *in esse* is merely technical—for making such a mortgage fasten on personal property, a car, for example, not made or existing at the time of making the mortgage, it would be better to abandon the attempt to give bondholders the property for which the makers have not been paid, and the fruits of the labor of others. There is no *equity* that requires that a bondholder or other mortgagee shall have the benefit, without compensation, of the money or labor of third persons, that has increased the value of the property.

The principle that a thing not *in esse* cannot be sold or mortgaged is not technical. It is simply impossible to sell that which does not exist—which cannot even be called '*that.*' It might as well be said that one could sell an unbegotten child as a slave. The *thing* to be sold is indispensable to a sale. And one cannot sell an indeterminate thing, as one horse, or one car, that he may by and by purchase or possess. If he buys two at once, which one did he sell? You cannot mortgage an indeterminate thing not in possession. To be sure, if you mortgage a thing, you mortgage its accessories; but the cars on a road are no more its accessories, than horses and oxen are accessories of land.

It is well that reason resumed her reign in *Stevens* v. *Railway*, 31 *Barb.*, 590; and *Beardsley* v. *Ontario Bank*, *Id.*, 619. The cases (we need not quote them) have held that mortgages made by railway companies (when authorized to do so by law) may convey the corporate property and franchises, and that if they convey the railways, rails, &c., rights and real estate, then or thereafter to be owned by them, all such property, subsequently acquired, is covered by them; that the *whole* road is held, though part of it was constructed on land acquired after the making of the mortgage; that mortgages may be so drawn as to bind subsequently acquired property; and that the franchise of operating the road and taking toll, or fare, or freight, passes by the mortgage, and may be sold under it, when it contains a special clause to that effect; that when property is purchased, and placed on a road, no lien being taken by the seller, it becomes subject to the mortgage lien on the road, so that it is not liable to an execution except under the mortgage; that when the road-bed, structure, rights and franchises, are mortgaged, the 'subject' includes *every species* of property owned by the company at the time of foreclosure, as *attached* or *incident* to the road itself.

Other courts have held, with better reason, that the right of taking toll is a franchise, which cannot be levied on and sold, unless the legislature which granted it assents to a transfer.

It has even been held that power to pledge the *franchises* of a company implies the power to pledge the firewood and coal purchased for use of the road; and that when after-acquired property of the road is specified in the mortgage, these are held by it.

It was held in *Bement* v. *Pittsburg, &c. Road*, 47 *Barb.*, 104, that the engines and cars of a road do not pass by a deed or mortgage of the track or way, as part of the fixtures or as constructively annexed to the road: but in *Hoyle* v. *Plattsburg &c. Railw.*, 51 *Barb.*, 45, it was held that after-acquired rolling stock and equipments might be held, the intent being to give a morgage on the whole property.

In *Miller* v. *R & W. Railway Co.*, 36 *Verm.*, 452, it was held that where a mortgage was of a *road*, under contract, it was designed to take effect on the *road*, as it should exist when the mortgagees should enforce their claim—the *whole* road, though the location might have been in places changed; with the accessions to it in the way of completing it, but only what was affixed to the land; and not the rolling stock or equipments.

There is great force in the opinion of Lord Cairns, which is quoted by Judge Redfield in ch. xxiii, §235*a*, 1. In England "the undertaking is pledged for the repayment of the money borrowed." That, in effect, Judge Redfield says, is all that is done by *any* railway mortgage. In England it had always been considered that the *property* of the company was mortgaged. Here it has been always held that the road itself, at least, could be sold upon a foreclosure or under execution. This case is well calculated to cause a careful consideration of the whole question; for here the road and all its property, and even the franchise of existence, have been sold, purchased by an individual, and the death of the corporation supposed to have been simultaneous with the sale. A joint stock company, formed of part of the creditors, took the name of the corporation, and without any legislative act of incorporation, is a party here in this court, as a corporation, with a decree recognizing it as having lawfully purchased the road and franchises subject to the mortgages. And here, too, the property has

been four years in the hands of Receivers, running the road, buying locomotives, borrowing money, building bridges, buying lands and erecting buildings. The court "undertook to execute the business of operating the road," a duty which the Legislature imposed on a company; and the action of the court being subject to no review or revision.

Lord Cairns held that the court could not do this, because Parliament had, for the public interest, authorized the construction and maintenance of the road, had made the company carriers, and conferred large powers on it, and imposed large and important responsibilities. These powers must be executed by the company, and cannot be delegated.

When the court undertakes to become a common carrier through its Receiver, to incur debts, buy land, and build bridges, there is no real and correlative responsibility for mismanagement. The public has no remedy, individuals no action, against the Receiver as a carrier who is responsible for the damages caused by accident owing to the negligence of the employés. It would not be fair to make the *company* responsible, when the control and mangement is taken from it.

If the *property*, the road *itself*, the right to take tolls, the franchises, can be mortgaged, *in the absence of a law* authorizing it—*and in this case there is no such law*—then it was always in the power of anybody holding a single bond to file a bill to foreclose the mortgage and have sale of the property; a small proportion of the bondholders,at any rate, could have done so; and it would have depended on the will and caprice of the creditors whether the road should ever be built at all, and part could insist on foreclosing, while the larger number might think it safest to let the company continue to carry on the road and earn toll and profits. How, then, could one properly maintain a suit for the benefit of all?

His lordship held that the "undertaking" was made over as a *going* concern; a thing complete or to be completed; and that it must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and earnings must be made subject to the claims of the mortgagees; but they could not seize the capital or lands or the stock, and prevent the completion of it, or destroy it when completed.

In the present case the *acquired* lands could be sold, and, of course, could be mortgaged by the company. The charter gives the express power to mortgage these, and *requires* them to be sold by a certain time or times. No other power to mortgage is given; and if the corporation could mortgage the road as a whole, or the undertaking, it *ought* to be held that the mortgagees would have no right to more than the appropriation of the earnings over expenses to the payment of their debts. The company should have been let to carry on the road, and been required to account for the earnings and pay them into court for distribution. Then all the creditors would retain some security, Pulsford as well as the bondholders, even if he must be postponed to them. But when the property, his sold is whole security is gone. The sales under execution were merely null, and should have been set aside.

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But, supposing that the mortgages are to be held to cover and subject the road itself, its bed, the rails, and all the after-acquired property, the depôt buildings, even the bridge over Galveston bay, there is all the more reason to inquire whether, if there be an equity in favor of the bondholders to have all this property for their security, they have any equity to be preferred to Pulsford, especially as to the road from Galveston, over land and water, to Virginia Point.

When the mortgage was made, the company had no land on Galveston island. The route or line of road was not fixed there. It could not lay a finger on an inch square of land there and say, This is mine, or ever certainly will be. Certainly, at law, the mortgage carried no interest in any land there. It did not convey after-acquired land, or an after-built road, or the rails laid down on a bridge that did not belong to it.

In *equity*, it is said, it is otherwise. There the mortgage will be held to include all this—to have fastened on the road as a whole, not as it was then, but as it was to be in time—as it would be when completed. Well, admit that: *why* will equity do that? Are there two laws of the contract? If so, does not equity *make* one of them? Equity cannot *make* law. It cannot make a contract to be what it is not. It cannot make a covenant of seizin be a covenant against in-

cumbrances. It may enforce estoppels, and so prevent a party from even alleging that a thing was or was not what in very fact it was or was not. It may enforce trusts which a court of law, from its constitution, cannot consider. It may hold that as done which a party agreed to do. It may enforce specific performance, and correct mistakes; it may determine that deeds absolute on their face were in reality and substance mortgages.

It will subject the after-acquired property of a railroad corporation to a mortgage, on the ground that it was the real intention of the parties that it should be so. If there was a promise to that effect and the mortgage evidences it, it will give the promise effect, as if it were a conveyance, though the things to be held did not then exist.

Why? Because equity and justice and right require it. That is why. If it will be iniquitous, unjust, unconscientious, to do it, it cannot be done without transgressing against the law of the court itself. If the after-acquired property, or additions by parts or branches to the road, were made with the means furnished by the mortgagees, or out of the earnings of the road built with their means, then it is supremely just that all the additional security so created should inure to their benefit. For it was the whole undertaking that was mortgaged to them, the income and profits of the road when it should be finished. That is the English view of it, and it offers a mode of escape from the contradictions and strained conclusions of the American jurisprudence.

But if, the means furnished by the mortgagees proving insufficient, others are obtained from other sources, and with these, portions of the road or connecting links before untouched, are builded, or rails laid down, *by means of which the portion built with the means of the mortgagees becomes available* and is made to yield an income, when before it was barren and fruitless, it may be very *in*-equitable and positively iniquitous, and akin to actual plundering, for the mortgagees to have, not only the actual and real benefit arising from the availabilty of the portion of the road on which their means were invested, or of the road built ready to receive the rails with their means, and then completed with their means of others, not paid for, but also the very portions of the road built by those others, and the very rails furnished and laid down by them.

If the road were not mortgaged, no one would pretend that

the *company* would have an *equity*, to have the avails of the means so furnished, without paying for them, because it had partly finished the road. The mortgagee is part-owner of the road, technically has the fee, is interested *as* owner, as entitled to the income, to have it completed. Why should he, more than the mortgagor, have an equity to confiscate the additions to it, or the super-structure made or put there with the money of others? If he has it, he can immediately foreclose his mortgage, and prevent the earning by the company, with (in part) the fruits of the means furnished by those others, of the income and profits with which to pay all in due order.

It is not a question whether these other parties, who advance and apply their means to *preserve* the property, and make it available as a common fund for the payment of all, have an equity by way of lien, or right to be first paid, which the court could be required by them to give effect unto. It is a question whether those who made prior advances can use their prior lien or joint ownership utterly to annihilate the chances of these more lately making advances, to be paid at all; whether those prior creditors have an equity that *compels* the court to do that cruel iniquity.

We say that they have *not*; and that although the court may not interfere against them, it will not interfere for them, to give them what is unconscienscious and unjust. Their own equity, which alone could give them the right to the aid of the court, as to subsequently acquired property, does not exist. Another equity meets and paralyzes it; or rather it never draws its first breath. It does not exist. All they can in justice and equity ask is their *share* of the earnings, in proportion to their investment. *They* could not finish the road and make it bear fruit. They permitted others to do it. Why should they have the whole fruit? Was not the incomplete road, in equity, *their* property, in part? A usufruct is a right in land; a hereditament or franchise is realty, though the proprietorship is in another. A right of possession in one, when the right of property is in another, is an interest in the land. The fictions of the law are the means by which it gives effect to equitable rights. It never uses them to work iniquity withal. The subtleties of the law are the delicate distinctions on which right judgment depends. The court that has not a vision keen enough to see them, robs men of their rights, by mistaking one state of case for an-

other that is distinguishable from it only by an acute intellect. Herein consisted the immense superiority of the Roman jurists; and in this the French lawyers and the great chancellors and admiralty and ecclesiastical judges have few peers.

Now, equity, that is, right and justice and fair and honest dealing, are not one thing in one court, or in one system of law, and not another thing in another forum. When one person has left a work incomplete, the funds he furnished not having sufficed, and another steps in and completes it, and sets it to earning profit, it is, in equity and justice, the common gage and pledge and security of both. What equity could the former have, more than the latter, to appropriate the whole fruits? The latter has the stronger and better equity to be first paid. Without him, it would have produced nothing for either.

The Roman law thus embodied the equity and justice which are the law still for every court of equity, upon this subject. The general rule is, The first in date in relation to a gage, is also the first in right. The two exceptions to this rule are, (*and they both apply to the case of Pulsford*,) 1st, that the first creditor is not preferred to the second, when the second has received the gage with the consent of the first; 2d, that there are certain hypothecary creditors who, although they are posterior in date, have the priority in right, by the nature of their gage, as when money has been employed, furnished by the second creditor for the conservation of the gage, and he lent it, for example, to equip and repair the vessel that is the object of the gage, or to victual the crew, or for the cargo engaged for it. If only one portion of the gage has been paid for with our money, and the other portion with that of another party, our privilege is only on the part paid for with our money. There is still another kind of privileged hypothecation, which a creditor has to recover the money which he lent to effect the rebuilding of a house.

Ulpian said, (Dig., Book XX, Tit., IV., No. 5,) *Interdum posterior potior est priori: utputà, si in rem istam conservandam impensum est quod sequens credidit: veluti si navis fuit obligata, et ad armandam eam rem, vel reficiendam ego credidero.*

*No. 6. Hujus enim pecunia salvam fecit totius pignoris causam. Quod poterit quis admittere, et si in cibaria nautarum fuerit creditum, sine quibus navis salva pervenire non poterat.*

This just and equitable principle had no peculiar application to vessels. A ship was mentioned only by way of example.

It has been incorporated into the English and American law, not because it is peculiar to maritime law, but because it is a rule of national equity and justice. Why should it not be applied in a Court of Equity? In the case of a mortgage on land, for example, purchased when a crop is standing, the creditor cannot have the crop until those are paid by whose labor it has been planted and raised and added to his security. He cannot be enriched at their expense. Why should it not be applied when moneys are borrowed by a mortgagee, and used in repairing a mortgaged house, when without the repairs it would inevitably fall into ruin? Wherever the money of the second creditor *salvam fecit totius pignoris causam*, the first creditor cannot have the benefit of the increase of his security, until he whose money or labor increased it, has been paid. Why has he an *equity* to have it without such payment being made, any more than the proprietor would have? Does he *lose* anything, or the second creditor take anything from him, when the repairs are paid for?

The mortgagee may always foreclose. If the mortgage be of realty he may bring ejectment. If he permits the thing to be completed or repaired, refraining from asserting his right to possession, does this enlarge his rights, so that he may, as soon as it is completed or repaired, take it and pay nothing? *Unusquisque suis fruatur, et non inhiet alienis*, said L. 1, of the CODE, *de Thesauro*.

*Privilegia non tempore æstimantur, sed causâ, et si ejusdem tituli fuerunt, concurrunt, licet diversitates temporis in his fuerint*, *L.* 32, *ff. de reb. auct. jud. possid.* So a claim which greatly commends itself to favor, always prevails over one whose cause is less to be favored; and the principle that it is the *quality* of the credit which determines the preference among privileged creditors, applies to all sorts of privileges, whether moveables or immoveables are their object. *Persil, Régime Hyp.* 6.

Formerly, those who had repaired or ameliorated the thing were always preferred. *Potior est qui salvam fecit totius pignoris causam.* The gloss on *L.* 19, *ff de Privil. Cred.* declared them payable before any other creditors; and it was so decided by many arrêts, reported by Mornac, part 2, No.

33, and by Tournet, on Article 171 of the Custom of Paris. The law of 11th Brumaire adopted this jurisprudence, and the Civil Code furnishes strong reasons for adhering to it. In fact, as architects have their privilege only *in quantum res pretiosior facta est*, the preference given them cannot prejudice the other creditors, because, after the value of the ameliorations is deducted, their security remains for them undiminished. *Persil, Régime Hyp.* 78.

Delso says, (2 *Examen sur les Priv.*, 652,) that when the purchaser of an immoveable has buildings erected on it, the privilege of the constructors on the added value is paramount to that of the vendor; and the reason he gives for it needs not to be enlarged on:—"*otherwise the vendor would be enriched at the expense of the constructors.*"

In *Tessier* v. *Dobilly and others*, 17 *Journ. de Pal.*, 554, one question was as to the preference of the privilege of a constructor for the cost of buildings erected after the purchase, as against that of the vendor for the unpaid price of the property. The Court held that the constructor had, for the value of his work, a privilege on the increase of value of the immoveable existing at the time of its alienation, and resulting from the work done on it; that these two privileges (this and that of the vendor), having distinct objects, could be enforced simultaneously, but could not conflict with each other; that thus the value which the immoveable would still have, if the work had not been done, remained reserved for the privilege of the vendor; and the increase of value given by the new erections, as estimated at the moment of the alienation, was charged with the architect's privilege; but that this increase of value ought not to be ascertained by an estimate of the actual cost, but proportionally to the original price of the immoveable; for that if the proceeds of the sale were less than the first cost, augmented by the value of the improvements, it was but fair that the diminution should be divided proportionally between the two.

Domat says: The creditor whose money has been laid out in preserving or repairing the thing, as for example, to secure a piece of ground against the current of a river, to prevent the fall of a bank, or to rebuild it after its fall, has a privilege. *For he has preserved the thing in being, for the common interest, both of the proprietor and creditors;* and it is, as it were, *his own, to the value of what he has laid out upon it.*

Those whose money has been laid out on the improve-

ments of an estate have a privilege on the improvements, as upon a purchase made with their money. But this is limited to what remains of them in being, but does not affect the whole body of the estate, *as does the preference on account of repairs which have preserved the whole estate in being.* For if there remains nothing of the improvements, the estate not being any the better for them, and no one profiting by them, there no longer remains any cause for preference. And when they still subsist, the privilege extends only to the value of what remains of them. *Cushing's Domat*, i, 683.

By "privilege" the Roman law meant the distinguishing right which the nature of his credit gave a creditor, and which made him to be preferred before other creditors, even those prior in time, and who had mortgages. The least of them gave a preference over mortgage creditors, (*Id.* 681;) and the reason was the plain one, that the mortgagee could have no higher right against such a privilege, than the mortgagor himself would have had in the absence of any mortgage.

*Creditor cui ob restitutionum ædificiorum crediderit, in pecuniam quam credierit, privilegium exigendi habebit.—Ulpian: L.* 25, ff. *de rebus creditis.*

*Divus Marcus ita edixit: creditor qui ob restitutionem ædificiorum crediderit, in pecuniâ quæ credita erit, privilegium exigendi habebit. Quod ad eum quoque pertinet, qui redemptori domino mandante pecuniam subministravit.—Ulpian: L.* 9, §1, *de privilegiis creditorum*, or *L.* 24, §1, *de rebus auctor. judicis possid.*

*Creditori qui ob restitutionem ædificiorum crediderit, privilegium exigendi datur.—Ulpian: L.* 1, ff. *de cessione bonorum.*

After stating the rule and giving as an example moneys advanced to repair a vessel, &c., Ulpian said: *Item si quis in merces sibi obligatas crediderit, vel ut salvæ fiant, vel ut naulum exsolvatur, potentior erit, licet posterior sit: nam et ipsum naulum potentius est.—L.* 6, §1, ff. *qui potiores in pignore vel hypothecâ habeantur.*

*Tantundem dicetur, et si merces horreorum, vel areæ, vel vecturæ jumentorum debetur. Nam et hic potentior erit.—L.* 6, §2, ff. *eod. tit.*

*Qui sentit commodum, debet sentire et onus: Quem sequuntur commoda, eumdem debent sequi et incommoda: Jure naturæ æquum est, neminem cum alterius detrimento et injuriâ fieri locupletiorem: Naturâ æquum est, neminem locupletiorem alterius jacturâ.*

It seems to us that "an eye single" has already been too much had by the courts to the equity which bondholders who are mortgagees or beneficiaries under deeds of trust of railroads have to all the property of the company, and the whole road when completed, with all its accessories and equipments, and to the franchises of the company. When we march too steadily on one line with our eyes fixed on a single object at the end of the road, we are apt to overlook or too little consider the equities that lie on either side; and sometimes to stumble on the way. Equity is not a sword that cuts clear through like the law. There must always, to attain right judgment, be a balancing of equities; and we doubt if it is not time for the courts to look somewhat at other equities that have a right to claim their attention labor in regard to such roads, and those whose means and are expended on them, *salvam facere totius pignoris causam.*

Principles the most evident, considered in themselves, and abstractedly from the facts to which they are applied, often lead to the gravest errors. But this is nevertheless not the fault of the principles, but of those who inconsiderately invoke them, in ignorance of their nature. In the law, all principles, whether natural or arbitrary, have for their basis justice, which is, as all know, the art of rendering to every one that which is his due.—*The Reporter*, in *Brechet* v. *Mariol*, 10 *Journ. du Palais*, 536.

*In omnibus rebus præcipua debet esse justitiæ æquitatisque, quàm stricti juris ratio. Code, L.* 8, *de Judiciis:* and, *Bonæ fidei non congruit, de apicibus juris disputare. Ulpian: L.* 29, §4, ff. *Mandati.*

In all our acts and contracts equity is to be kept in view, so that we may in no respect depart from it; *maximè tamen in jue*, whether we respond to questions or decide as judges; so that the law may always be construed by equity, and our opinions and judgments in nothing offend it. This was the glory of Servius Sulpicius, *who was not more learned in the law than in justice, and read the Civil Law by the light of Equity.*—*Pothier, Pand.*, xxiii, 36, *n.* 1.

It is equally as necessary to read the law of the court of equity by that light, and to be not more learned in *that* law than in justice; since an equitable principle, misapplied or carried too far, and without duly considering how far other equities qualify and modify and oppose the principal one, may as efficiently become a patron of wrong and injustice, as any principle of absolute law.

ments of an estate have a privilege on the improvements, as upon a purchase made with their money. But this is limited to what remains of them in being, but does not affect the whole body of the estate, *as does the preference on account of repairs which have preserved the whole estate in being.* For if there remains nothing of the improvements, the estate not being any the better for them, and no one profiting by them, there no longer remains any cause for preference. And when they still subsist, the privilege extends only to the value of what remains of them. *Cushing's Domat*, i, 683.

By "privilege" the Roman law meant the distinguishing right which the nature of his credit gave a creditor, and which made him to be preferred before other creditors, even those prior in time, and who had mortgages. The least of them gave a preference over mortgage creditors, (*Id.*, 681;) and the reason was the plain one, that the mortgagee could have no higher right against such a privilege, than the mortgagor himself would have had in the absence of any mortgage.

*Creditor cui ob restitutionem ædificiorum crediderit, in pecuniam quam credierit, privilegium exigendi habebit.—Ulpian: L.* 25, ff. *de rebus creditis.*

*Divus Marcus ita edixit: creditor qui ob restitutionem ædificiorum crediderit, in pecuniâ quæ credita erit, privilegium exigendi habebit. Quod ad eum quoque pertinet, qui redemptori domino mandante pecuniam subministravit.—Ulpian: L.* 9, §1, *de privilegiis creditorum*, or *L.* 24, §1, *de rebus auctor. judicis possid.*

*Creditori qui ob restitutionem ædificiorum crediderit, privilegium exigendi datur.—Ulpian: L.* 1, ff. *de cessione bonorum.*

After stating the rule and giving as an example moneys advanced to repair a vessel, &c., Ulpian said: *Item si quis in merces sibi obligatas crediderit, vel ut salvæ fiant, vel ut naulum exsolvatur, potentior erit, licet posterior sit: nam et ipsum naulum potentius est.—L.* 6, §1, ff. *qui potiores in pignore vel hypothecâ habeantur.*

*Tantundem dicetur, et si merces horreorum, vel areæ, vel vecturæ jumentorum debetur. Nam et hic potentior erit.—L.* 6, §2, ff. *eod. tit.*

*Qui sentit commodum, debet sentire et onus: Quem sequuntur commoda, eumdem debent sequi et incommoda: Jure naturæ æquum est, neminem cum alterius detrimento et injuriâ fieri locupletiorem: Naturâ æquum est, neminem locupletiorem alterius jacturâ.*

It seems to us that "an eye single" has already been too much had by the courts to the equity which bondholders who are mortgagees or beneficiaries under deeds of trust of railroads have to all the property of the company, and the whole road when completed, with all its accessories and equipments, and to the franchises of the company. When we march too steadily on one line with our eyes fixed on a single object at the end of the road, we are apt to overlook or too little consider the equities that lie on either side; and sometimes to stumble on the way. Equity is not a sword that cuts clear through like the law. There must always, to attain right judgment, be a balancing of equities; and we doubt if it is not time for the courts to look somewhat at other equities that have a right to claim their attention labor in regard to such roads, and those whose means and are expended on them, *salvam facere totius pignoris causam.*

Principles the most evident, considered in themselves, and abstractedly from the facts to which they are applied, often lead to the gravest errors. But this is nevertheless not the fault of the principles, but of those who inconsiderately invoke them, in ignorance of their nature. In the law, all principles, whether natural or arbitrary, have for their basis justice, which is, as all know, the art of rendering to every one that which is his due.—*The Reporter*, in *Brechet* v. *Mariol*, 10 *Journ. du Palais*, 536.

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In this case the company was authorized by its charter to borrow money on its notes or bonds, to purchase and hold lands, not exceeding 50 yards in width, on which to lay its road, and sufficient in addition on which to erect buildings. No power was given to alienate these lands, or charge them, or the road, or the franchises of the company, by way of hypothecation. But the company was authorized to acquire *other* lands, by purchase, donation, or in payment of stock, *for the purpose of aiding in the construction and maintenance of the road;* and *such* real estate acquired by the company could be aliened or mortgaged by vote of a majority of the directors, for the construction or maintenance of the railway. Whatever contracts or conveyances the charter authorized [for sec. 5, last clause, *can* have no other or wider meaning] could be executed when authorized by the directors in pursuance of a vote.

Upon a proper and sound construction of the charter, the company had *no* power to mortgage or sell the strip of land on which the road was to run. It was not intended to give it the power to put an end to its existence, after receiving the lands to be granted by the State, or the power to expose itself to annihilation, during its term of life of ninety years, perhaps before the road should be completed, at the mercy of a part of its creditors. The public, the State, had a deep interest in the building and continuance of the road.

It is neither alleged in the pleadings, nor attempted to be proven, that the stockholders ever met *at all*, much less that *they* ever authorized the issuing of any of the bonds. It is not proven that the issuance of any of the bonds was ever authorized by any vote of the directors; the record of such vote has not been produced, and the absence of the record-book is most lamely accounted for. The bill does not even allege any such vote; but only that "the company made, executed and delivered" the mortgages, by virtue of the powers conferred on it by the State, and according to the provisions of its charter.

The mortgage to secure the 10 per cent. bonds expressly provided that *none* of them should be issued except by the cancelling of a like amount of the 6 per cents. It was to take the place of the first mortgage, and be a first lien. Under that first mortgage, bonds could only be issued to the amount of $750,000. Under the second mortgage the company could be responsible only for that amount, at the utmost, if *all* the 6 per cents. had been issued; and if all *had*

not, then only to the amount of such as *had* been lawfully issued, to *bonâ fide* holders, for the purpose of obtaining funds for the construction of the road, unless they had come to the hands of third persons without notice of illegality in their issue.

In Europe, while Valentine was agent, only 44 of the 6 per cents had been sold, and, *it seems*, 956 deposited with the London and Eastern Bank, to secure a loan of $100,000. 308 of these were redeemed with 10 per cents., and cancelled.

Yet the whole amount of $750,000 in 10 per cent. bonds was issued in utter disregard of the mortgage. In 1858 there remained £5,200 of the 6 per cents. outstanding, besides the $160,000, or £32,000, on deposit.

Except those used in exchange for the 308 6 per cents. on deposit (or hypothecated) it does not appear that *any* of the 10 per cents. were used in exchange for 6 per cents; and, in fact, more 6 per cents. (52) were outstanding in 1858 (*Rec.*, 731,) than when Valentine ceased to be agent, the number then being 44. (*Rec.*, 324.) The whole $750,000 of 10 per cents are accounted for by Valentine as sold, except the $154,000 exchanged, and $34,300 paid to Braine.

Therefore, except the $154,000, every 10 per cent. bond was illegally issued and disposed of, *and was by the terms of the second mortgage itself, expressly excluded from any benefit of the security created by it.* Every purchaser of such a bond might have a just claim against the *company*, in an action at law on the bond; but not a single holder of any bond except those delivered in exchange for 6 per cents., is secured by the mortgage.

The third mortgage was to take the place of the second, as to the 6 and 10 per cent. bonds. It covered also $1,875,000 of new liability, for bonds not to be exchanged. Of the $750,000, there could be no right to issue more than would suffice to take up all the 6 per cents., outstanding, and such 10 per cents. as had been issued in exchange for other 6 per cents. cancelled upon the exchange. There *could* be no greater liability under the mortgages, than this sum of $1,875,000, and $314,000 for such 6 and 10 per cents. In 1858 there remained undisposed of, of the 8 per cents., 8,046 ($804,600); and 5,662 were only pledged as guarantee for advances, to what amount we do not know. (*Rec.*, 729.) The real liability under the mortgages is prob-

ably not more, including interest, than $1,500,000; and it is quite certain, if all the facts could be developed, that Kimball and his confederates, and those who hold under him and them, have no claim on the bonds bought of the liquidators of the London & Eastern Bank, for any more than was paid for them, with interest. *It is not shown that they have parted with them*; and it is certain that, being members of the corporation, officers, agents, attorneys in fact, and trustees, they could not buy for themselves, but only for the company; besides which there is every reason to believe that they bought with means that belonged to the company.

The holders of the 8 per cent. bonds sold in Europe or elsewhere, are secured only by the third deed. It was made on the 8th of October, 1857, but not recorded until the 23d of June, 1859. (*Rec.*, 23.) Mr. Saint Cyr found it at Galveston, among the papers of the company, in July, 1858. *He took possession of it*, in his capacity as "Agent of the *European Attorneys in fact*," and *kept* it in possession, intentionally withholding it from record, "as a weapon which, in case of a misunderstanding, he could use against his constituents." (*Rec.*, 723,4.)

In December, 1858, Valentine was paid by the European Board to act in its interests at Galveston. (*Rec.*, 726.)

"In America, more than one million (francs) diverted from its legitimate use, an incomplete road, forfeiture incurred, and in Europe 4,000 bonds in circulation out of an issue of 26,250, a subscription ruined by an American financial crisis, and not even any definitive titles to surrender to the subscribers of these bonds. Such was the situation of the company and the Board of Attorneys in fact, in November, 1857." (*Rec.*, 719.)

"At the close of December, [1858], the situation of the company was more critical than ever. In America, notwithstanding a contract for 525,000 francs, the second section, to Harrisburg, cost nearly one million. M. de Saint Cyr, in charge of the running operations of the road, wrote to us first that the traffic barely defrayed the expense, and, two months after, that heavy rains had rendered the road impassable. In Europe, the loans, by the means of which we had procured that million, as well as the former debts of the company, could no longer be paid when due. It became necessary to resort to ruinous renewals, and at the same time, to prevent the bonds from being unsaleable in the

future, to meet, one year longer, the payment of the coupons." (*Rec.*, 725.)

It became necessary "to send, before the close of June, [1859], to Texas, funds enough to construct at least the six miles to Galveston," and in part to satisfy the American creditors, who had obtained or were obtaining judgments." But "the efforts of the attorneys in fact, both in England and France, had met with only partial success." (*Rec.*, 726.)

The company was notoriously bankrupt, from January to August, 1859, without money or credit. The line was constructed from Virginia Point to Houston. It ended in the prairies, and was without moneys or public confidence. (*Rec.*, 595.) Between Virginia Point and Galveston was the Bay, two miles wide, and five miles of the Island. No attempt had been made to locate or construct that part of the road, and the company had obtained no title to land on which to build it. (*Rec.*, 596.) Unless connected with Galveston by extension of the road over the bridge and island, the undertaking was a failure. The earnings would not pay expenses, and the whole investment certain to be lost.

Valentine, on returning to Paris, met Robert Pulsford, who was already a creditor, *in the office of the attorneys in fact, obtained his confidence, and succeeded in concluding a bargain* for £10,000, to build that part of the road, and iron it and the bridge. *It had appeared necessary* to these creditors, Shee and Pignere, representing the European creditors, to obtain these funds. On the 21st of May, 1859, the third mortgage being yet unrecorded, Pulsford entered into an agreement to furnish the money and iron. The company already owed him, for moneys obtained from him on deposites of 8 per cents, by the European Board of Attorneys, £9,686. The contract stipulated for a bond of the Vice President and Treasurer, ensuring the application of the money to the building of the road on the island, and for a judgment for the residue of the £10,000, after purchase of certain other judgments, against the company, and also for a mortgage to subject the lands and property, real and personal, of the company, and 40 per cent. of the gross earnings.

The contract with Pulsford was signed in London by Kimball and Walker, but it was negotiated at Paris, in the office of the attorneys in fact or European Board, *who had nego-*

*tiated with Pulsford the former loans.* This board represented Micard and Pignere & Co., holders of the larger part of the 8 per cent. bonds, of which, also, Pulsford himself had 920. The contract with Pulsford, and the creation by it of a lien in his favor on the whole undertaking, to the extent of 40 per cent. of the earnings, *were made and done with their knowledge and consent*, and they thereby postponed all claim and lien they might have, under the unrecorded third mortgage, to the lien created in his favor. *As against them and all the bonds they hold, and all that Valentine and any one who was then a Director of the company hold*, Pulsford's lien on the property, real and personal, of the company, and on 40 per cent. of the gross earnings, is paramount.

And, furthermore, *fucere salvam totius pignoris causam*, it was absolutely indispensable for the road over the island to be built. The funds and rails which he furnished were applied to that, and before the bondholders can take to themselves the benefit of that addition, they must pay him, or allow him to receive from the earnings the moneys still due to him.

If the road had been in the hands of a Trustee, still incomplete, and he had been able to complete it out of the earnings, of course he would have paid the cost out of those earnings, as he would have paid for repairs or necessary erections of water-tanks, sheds, and depôts. If he had not had rails to lay down on the bridge, he would have bought them, and paid for them out of the earnings. The Court below authorized the *Receiver* to purchase the bridge.

Certainly it is equally just that the rails laid on the bridge, and the road and rails on the island, should be paid for, before they should go to increase the security of the prior mortgages. The company obtained the money and rails, for the benefit of the whole pledge, by means of the stipulations of the contract, and the mortgagees cannot have the benefit of them, and repudiate the conditions on which alone they were allowed to be applied.

In *Collins* v. *The Central Bank*, 1 Kelly, 435, the charter of the Railroad and Banking Company contained this disposition: "*The railroad to be built* by said company, from Macon to Forsyth, together with *all revenues* arising therefrom, and *all the property, equipments and effects* therewith connected, shall be pledged and bound for the redemption of the notes or bills issued by or from said company."

Before the road was finished, the company became insolvent, and contracted with Collins and others for certain work and materials, to complete the road, the company agreeing to secure the payment for such work and materials, by a lien or mortgage on the road and property of the company. Under this contract, iron and rolling-stock were furnished, to a large amount, and twenty-five miles of the road built. The mortgage conveyed the whole of the road, all appurtenances, rolling-stock, implements, &c., connected or to be connected with it, all real estate and all other effects to it appertaining, to secure the payment for such work and materials.

The court below held the lien created by the charter to be paramount to *all* others. The Supreme Court held that this lien fastened only on so much of the road as was built *by the company*, and equipments and materials furnished by *it*. But it held that the part built by the contractors was not built by the company, and that the materials and equipments furnished by them were not furnished by the company; and that it *could* create a lien in their favor, on the unfinished part, paramount to any lien of the bill-holders, to the extent of the work done and materials furnished. But the court went further and held that the company *would not have been entitled to that part of the road built by the contractors, until these had been paid;* and the bill-holders could have no greater right than the company itself, in a Court of Equity. The court said that natural justice was in favor of the contractors, besides their express contract; that they had the full title and estate of the road built by them, until they should be paid; and that their agreement was in accord with and furtherance of the legislative intention, that the road should be completed.

The court did not apply the principle of the Roman law, *in totidem verbis;* but it did say that the bill-holders did not take the bills on the faith and credit of so much of the road as was unfinished when the company became insolvent; that the company could not be considered *owners* of that part of the road, until they had paid for it; and that there was no principle of equity or morals, on which the bill-holders, claiming under or through the company, could appropriate to themselves the proceeds of the work and materials of the contractors, without first paying for them. And it gave the contractors a decree, of a prior and superior equity, to be

paid out of the *whole* fund, to the extent and in proportion to the relative value of the work done by them, and materials and equipments furnished.

Where a mortgage covering a railway and all apparatus was executed, and three hundred of the bonds issued before the road was wholly graded, and when no more than one-fourth of the cost of construction had been expended, and while in that state the company, being unable to finish the construction, contracted with a third party to do it, under a contract to pay him partly in their bonds and partly in money, and with an agreement that he should retain the possession and use of the road and its fixtures, &c., until paid; it was decided in equity, that the contractor acquired a lien prior to that of the mortgage, to the extent of his expenditures. *Dunham* v. *Cincinnati, &c. Railway*, 13 Railway T., 339.

Thus the courts have sometimes felt that the equities of which we have spoken, may exist. These cases seem to recognize the equitable principles of the Roman Law, and we cannot but believe they will commend themselves to the enlightened judgment of this court.

The contract with Pulsford was draughted and executed in England. It evidently was intended to secure him by a charge on the undertaking, by which, according to the English law, his only fund for satisfaction would be that furnished by the earnings and profits.

If he cannot be paid in preference to the bondholders, out of the proceeds of the property and franchises when they have been sold. (if the decree of sale is to be affirmed,) it will be most unjust that he should not be paid, by means of the part of the road built with his means, and rails furnished by him, on the faith of what he deemed a valid security; and that these prior creditors should have the whole benefit of what he thus added to the road. Such injustice will continually occur, if the course of American decision continues; and we earnestly hope that the court will review the whole ground and be led to the conclusions reached by Lord Cairns, by his reasonings, which seem unanswerable.

The creditors have the right to turn their bonds into stock. It will be easy to revive the company, and the undertaking may then be carried on for the benefit of all concerned, all the debts being payable under the direction of the court in a determined order. If *sold*, the property will be sacrificed, and all the bondholders, save those who are of

the small number of the purchasers, will lose all. There are, it seems to us, insuperable objections to the scheme proposed by the court below, of allowing the payment of the price to be made in bonds; and it will be easy to point these out to the court.

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